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P.V.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 1

HARRY BRIDGES, PETITIONER,

vs.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1940.

CERTIORARI GRANTED APRIL 8, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

HARRY BRIDGES, PETITIONER,

vs.

STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX.

	Original	Print
Proceedings in Supreme Court of California	1	1
Petition for writ of review (omitted in printing)	1	1
Exhibits:		
"A"—Affidavit of J. Louis Elkins	38	1
Affidavit of L. E. Lampton	52	4
Exhibit "A"—Permanent injunction issued by Superior Court, Case No. 420,356	57	8
Exhibit "B"—Findings of fact and conclusions of law by Superior Court Case No. 420,356	61	10
Affidavit of Charles E. Sharritt	85	26
Affidavit of A. G. Stanham (omitted in printing)	94	
"B"—Order to show cause in re contempt, Case No. 420,356	111	31
"C"—Motion to quash order to show cause in re contempt	113	32
"D"—Demurrer to order to show cause in re contempt	127	40
"E"—Memo. opinion and order on demurrers, etc. (omitted in printing)	137	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1940.

—6400

	Original	Print
Petition for writ of review—Continued.		
Exhibits—Continued.		
"F"—Answer of H. R. Bridges, sometimes known as Harry R. Bridges	161	41
"G"—Demand for jury trial	168	43
"H"—Judgment, opinion and imposition of sentence	169	43
"I"—Judgment	178	48
"J"—Notice of motions: First, to dismiss; second, to vacate judgment of contempt; third, for new trial	186	53
"K"—Order extending stay (omitted in printing)	193	
"L"—Order extending stay (omitted in printing)	194	
Memorandum of points and authorities in support of petition for writ of review (omitted in printing)	196	
Exhibit:		
"M"—Reporter's transcript in re contempt	1	56
Caption and appearances	1	56
Testimony of Brian Bell	2	57
Lawrence Resner	11	62
Arthur Eggleston	60	92
James D. O'Neil	68	98
Harry R. Bridges	86	108
Reporter's certificate	115	125
Order denying petition for writ of review	116	126
Order vacating judgment and granting writ of review	117	126
Stipulation amending reporter's transcript	118	127
Pro. Exhibit 1—Newspaper article	121	128
Pro. Exhibit 2—Newspaper article	122	129
Stipulation as to return by respondent to and record upon writ of review	123	131
Opinion, Curtis, J.	131	136
Dissenting opinion, Edmonds, J.	150	161
Judgment	183	177
Order denying petition for rehearing	184	177
Clerk's certificate (omitted in printing)	185	
Order extending time within which to apply for writ of certiorari	186	178
Stipulation as to printing of record	189	178
Order allowing certiorari	192	180

[fols. 1-38-40] EXHIBIT "A" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, In Contempt

AFFIDAVIT OF J. LOUIS ELKINS

STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. Louis Elkins, being by me first duly sworn, deposes and says:

* * * * * * *

[fol. 41] Second Count

That he is the Executive Secretary of Los Angeles Bar Association;

That on or about the 18th day of September, 1937, an action was commenced in the above entitled court by the filing of a complaint and the issuance of a summons entitled [fol. 42] "P. W. Walker, et al., plaintiffs, vs. International Longshoremen's Association—Local 38-82, Inc., a corporation, et al., defendants," which said action is known as action number 420356 in said court.

That said action was tried in the above entitled court before the Honorable Ruben S. Schmidt, Judge thereof, and on the 21st day of January, 1938, the said Ruben S. Schmidt, as Judge of said Court, made, signed and filed his Findings of Fact and Conclusions of Law in said action, a copy of which said Findings of Fact and Conclusions of Law, with the amendments thereto and deletions therefrom made subsequent to the date of the signing and filing of said Findings of Fact and Conclusions of Law, is attached hereto and marked Exhibit "A".

That the nature of the controversy involved in said action and the relief adjudged to the parties thereto will appear from said Findings of Fact and Conclusions of Law.

The pendency of said action No. 420,356, at the date of the publication of the contents of the telegram as herein-

after set forth, will appear from the affidavit of L. E. Lampton, subscribed and sworn to by him on the 24th day of February, 1938, and filed herein concurrently herewith, hereby referred to for particulars.

That for several months last past since the filing of said [fol. 43] action as aforesaid, the existence thereof and the controversy involved therein has received wide and general publicity in the Pacific Coast states of the United States of America. That almost daily for several months last past news items respecting the controversy involved in said action and conditions in the maritime industry on the Pacific Coast as a result of said controversy have appeared in the daily newspapers published and circulated in the City of Los Angeles and in other cities in the County of Los Angeles, and the existence of said controversy and the fact that said controversy was pending in the courts for determination has been a matter of great public interest and general public discussion.

That the making, filing and pendency of the motion for a new trial and the motion to vacate the judgment and decision in said action also have been since the filing thereof and now are matters of public knowledge and interest.

That, as will appear from said Findings of Fact and Conclusions of Law, said action involved a controversy between maritime workers, some of whom are affiliated with the American Federation of Labor and some of whom are affiliated with the Committee for Industrial Organization and many of whom at the commencement of said action were and some of whom now are members of International [fol. 44] Longshoremen's Association Local 38-82, Inc., a corporation.

Affiant is informed and believes and on such information and belief alleges that on the 24th day of January, 1938, the said H. R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States at Washington, D. C., which said telegram contained words and figures as follows, to-wit:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshore-

men with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend [fol. 45] to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

That affiant is informed and believes and upon such information and belief alleges that said H. R. Bridges on said 24th day of January, 1938, at or about the time of the sending of said telegram to said Frances Perkins, caused a copy thereof to be given to James D. O'Neil for the purpose and with the intent that the contents of said telegram should and would be furnished to and published in newspapers on the Pacific Coast and elsewhere.

Affiant is informed and believes and upon such information and belief alleges that said James D. O'Neil, acting as such publicity agent for said International Longshoremen's and Warehousemen's Union District No. 1, and pursuant to the express instructions of said H. R. Bridges and with his consent, gave said telegram to a newspaper reporter, or newspaper reporters, the name or names of whom are unknown to affiant.

That on or about the 24th and 25th days of January, 1938, excerpts from said telegram which are hereinabove set forth were published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles [fol. 46] in the State of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere, all as is more particularly set forth in the affidavit of Charles E. Sharritt, subscribed and sworn to by him on the 24th day of February, 1938, and filed herein contemporaneously herewith. Reference to which said affidavit is hereby made for further particulars.

Affiant is informed and believes and on such information and belief alleges that the contents of said telegram, as hereinabove set forth, were put in the course of publication by said H. R. Bridges for the purpose of bringing the same to the personal attention of and influencing the said Ruben

S. Schmidt to make an order granting a new trial in said action, or to vacate said judgment and decision and discharge said receiver or vacate said permanent injunction theretofore made and entered in said action.

That the statements contained in said telegram and the publication of the fact of sending said telegram and the publication of the contents thereof as aforesaid were in and of themselves calculated and had an inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action No. 420356, and interfere with, sway, control, embarrass and influence the actions and decisions [fols. 47-50] of said Ruben S. Schmidt, acting as a judge of said Superior Court;

(2) Interfere with the orderly and due administration of justice in said action;

(3) Bring about and cause the vacation of the judgment theretofore made by said Ruben S. Schmidt and the appointment of a receiver for said International Longshoremen's Association, Local 38-82, Inc., a corporation, provided for in said judgment, and a vacation of the permanent injunction theretofore rendered and entered in said action, and to cause said judge to grant a new trial in said action, or to modify said judgment, or said permanent injunction.

* * * * * * *

[fol. 51] J. Louis Elkins.

Subscribed and sworn to before me this 24th day of February, 1938. Ernestine Stahlhut, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 52] In Superior Court of the State of California in and for the County of Los Angeles

In the Matter of H. R. Bridges, Sometimes Known as Harry R. Bridges, in Contempt

Affidavit of L. E. Lampton, County Clerk

State of California,
County of Los Angeles, ss:

L. E. Lampton, being by me first duly sworn, deposes and says: That he is now and at all times herein mentioned was

the duly appointed, qualified and acting County Clerk of the County of Los Angeles, State of California, and ex-officio clerk of the Superior Court of the State of California in and for the County of Los Angeles.

That Ruben S. Schmidt is now and at all times herein mentioned has been a duly elected, qualified and acting judge of the Superior Court of the State of California in and for the County of Los Angeles.

That on the 18th day of September, 1937, an action was commenced in the above entitled court by the filing of a complaint and the issuance of a summons entitled "P. W. Walker, et al., plaintiffs vs. International Longshoremen's Association—Local No. 38-82, Inc., a corporation, et al., defendants," which action is known as No. 420356 in said court.

That in and by said action was sought an injunction, an accounting, the appointment of a receiver and other equita-
[fol. 53] ble relief.

That on the 28th day of September, 1937, an answer to plaintiffs' complaint was filed in said action by the defendants International Longshoremen's Association, Local 38-82, Inc., a corporation, Roy M. Donnelly, as President thereof, Francis G. Fetzer, as Secretary Treasurer thereof, and Tom Provence, Joe Simons, C. W. Hanson, C. S. Pugh, A. Lindman, A. W. Springer, W. S. Lawrence, H. C. Viethaus, R. Reedy, Dan Kelly, Roy M. Donnelly and Francis G. Fetzer, as members of the Board of Directors of said corporation, and on said date a cross-complaint was filed therein by International Longshoremen's Association, Local 38-82, Inc., a corporation, against all of the plaintiffs in said action. That thereafter said action was set for trial and came on regularly for hearing and was tried before the Honorable Ruben S. Schmidt as Judge of said Superior Court, sitting in Department No. 4 thereof.

That thereafter, to-wit, on the 8th day of December, 1937, the said Ruben S. Schmidt, as Judge of said court, ordered judgment for plaintiffs and ordered that a receiver be appointed for said International Longshoremen's Association, Local 38-82, Inc., a corporation, and that a permanent injunction issue as prayed for in plaintiffs' complaint, and ordered judgment for the defendants and cross-complainants decreeing that said corporation had the right and power to amend its articles of incorporation by complying
[fol. 54] with the provisions of Section 362, 362-a and 362-b

of the Civil Code of the State of California for any or all of the purposes provided in Section 362 of said Civil Code.

That thereafter, to wit, on the 21st day of January, 1938, the said Ruben S. Schmidt, as Judge of said Court, made and filed his findings of fact and conclusions of law, and made and filed a judgment in said action, and made and filed a permanent injunction therein, in and by the terms of which said judgment a receiver was appointed for said International Longshoremen's Association, Local 38-82, Inc., a corporation, and on said date, to wit, the 21st day of January, 1938, the receiver so appointed by said judgment, to wit, Will Hays, qualified by filing the bond required by said judgment to be filed by him and by making and filing his oath as such receiver. That on the 22nd day of January, 1938, an order was made and entered in said action by said Ruben S. Schmidt staying the execution of said judgment and said injunction to January 29, 1938, which said order was filed on January 24, 1938. That said judgment and said permanent injunction were entered by the Clerk of this court on the 24th day of January, 1938, in Judgment Book 986, pages 341 and 345, respectively, in the office of said County Clerk, copies of which said judgment and said permanent injunction are annexed hereto and marked Exhibits "A" and "B" respectively.

[fol. 55] That on the 25th day of January, 1938, notice of the entry of said judgment was served upon defendants' counsel and said notice of entry of judgment was filed in said action on the 27th day of January, 1938.

That on the 24th day of January, 1938, all the defendants in said action against whom said judgment had been rendered and said permanent injunction issued, served a notice of intention to move for a new trial and a notice of motion to vacate the judgment and decision in said cause in whole, and said notice of intention was filed on January 26, 1938.

That on the 27th day of January, 1938, there was filed in said action a stipulation executed by counsel for the respective parties extending the stay of execution of said judgment, said order and said permanent injunction to February 2, 1938, and based on said stipulation, said Ruben S. Schmidt made an order staying the execution of said judgment, order and permanent injunction to said date.

That on the 29th day of January, 1938, said motion for a new trial and said motion to vacate said judgment and decision came on for hearing before the said Honorable

Ruben S. Schmidt, sitting in Department No. 28 of the above entitled court as Judge thereof, and on said 29th day of January, 1938, the hearing of said motion for a new trial and said motion to vacate said judgment and decision was continued to February 2, 1938.

[fol. 56] That on said February 2, 1938, the hearing of said motion for a new trial and said motion to vacate said judgment and decision commenced before the said Honorable Ruben S. Schmidt, sitting in Department No. 28 of the above entitled court as Judge thereof, and hearings thereof were held before said Judge each court day thereafter to and including the 4th day of February, 1938, upon which said date said motions were taken under submission by said Judge and, as of the date of this affidavit, said motions remain undecided by said Judge and said case is still pending in the above entitled court.

L. E. Lampton.

Subscribed and sworn to before me this 24 day of February, 1938. Ernestine Stahlhut, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 57] EXHIBIT "A" TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

P. W. WALKER, R. A. PATTERSON, C. H. LINDEGREN, M. D. Rodgers, Elmer Bruce, O. M. Benton, A. L. Bebo, W. J. Hull, A. H. Peterson, Jack Eduardson, C. E. Caldwell, Lyle Young, J. W. Bowley, Joe Sumption and J. W. Cobo, Plaintiffs,

—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL No. 38-82, INC., a Corporation; Roy M. Donnelly, as President Thereof; Francis G. Fetzer, as Secretary-Treasurer Thereof, and Tom Provence, Joe Simons, C. W. Hanson, B. Franklin, C. B. Pugh, A. Lindman, L. Young, A. W. Springer, W. S. Lawrence, M. A. Anderson, V. Black, George Murphy, Tom Parker, H. C. Viefhaus, R. Reedy,

Dan Kelly, E. L. Bowen, Roy M. Donnelly, Francis G. Fetzer, as the Board of Directors of Said Corporation, Defendants

PERMANENT INJUNCTION

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law, and the decision thereon in writing, having been rendered, wherein judgment was ordered in favor of plaintiffs, and against defendants and for costs, on motion of attorneys for plaintiffs:

It is Ordered Adjudged and Decreed, that the said defendants, International Longshoremen's Association—Local No. 38-82, Inc., a corporation, Roy M. Donnelly, as President thereof, Francis G. Fetzer, as Secretary-Treasurer thereof, and Tom Provence, Joe Simons, C. W. Hanson, C. S. Pugh, A. Lindman, A. W. Springer, W. S. Lawrence, [fol. 58] H. C. Viefhaus, R. Reedy, Dan Kelly, Roy M. Donnelly and Francis G. Fetzer, as members of the Board of Directors of said corporation, their agents, servants, employees, counselors, attorneys, solicitors, and all other persons acting in aid or assistance of them and each of them, be and they are each and all of them hereby permanently restrained and enjoined from attempting to secure a charter and from attempting to have any kind of affiliation with the Committee for Industrial Organization, or with the Committee for Industrial Organization, Pacific Coast District, or with the International Longshoremen's & Warehousemen's Union, or with the Committee for Industrial Organization, Industrial Council of Los Angeles, or from authorizing and making expenditures to or on behalf of the said Committee for Industrial Organization or to or on behalf of the said Committee for Industrial Organization, Pacific Coast District, or to or on behalf of the said International Longshoremen's & Warehousemen's Union, or to or on behalf of the Committee for Industrial Organization, Industrial Council of Los Angeles, or to or on behalf of Don Cox, Elmer Mevert and J. D. Thomas, organizers for the Committee for Industrial Organization, or from attempting to affiliate with or join or accept a charter from the said Committee for Industrial Organization, or from the Committee for Industrial Organization, Pacific Coast District, or from the said International Longshoremen's & Warehouse-[fol. 59] men's Union, or from the Committee for Industrial

Organization, Industrial Council of Los Angeles, or paying or distributing any of the property or assets or funds of the International Longshoremen's Association, Local No. 38-82, Inc., a corporation to the Committee for Industrial Organization or to the Committee for Industrial Organization, Pacific Coast District, or to the International Longshoremen's & Warehousemen's Union, or to the Committee for Industrial Organization, Industrial Council of Los Angeles; and so long as said individual defendants and/or each of them remain members and/or officers and/or directors of said International Longshoremen's Association, Local No. 38-82, Inc., they and each of them are permanently restrained from organizing or attempting to organize any new union of longshoremen within Los Angeles Harbor or Long Beach Harbor or attempting to operate any meeting hall or any hiring hall for any new union of longshoremen; or from attempting to perform any of the functions now performed by the International Longshoremen's Association, Local 38-82, Inc. in or through any new union or organization; or from attempting to organize any new union, or from using any of the property and/or funds of said International Longshoremen's Association, Local No. 38-82, Inc., for any of the purposes against which they are by this injunction restrained.

The foregoing injunction is subject to the right and power [fol. 60] of the cross-complainant to amend its Articles of Incorporation by complying with the provisions of Sections 362, 362a and 362b of the Civil Code of the State of California, and may amend its Articles of Incorporation for any or all of the purposes provided by Section 362 of the Civil Code of the State of California.

Dated at Los Angeles, California, this 21st day of January, 1938.

Ruben S. Schmidt, Judge.

[fol. 61] EXHIBIT "B" TO AFFIDAVIT

In the Supreme Court of the State of California in and for the County of Los Angeles

No. 420356

P. W. WALKER, et al., Plaintiffs,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION—LOCAL NO. 38-82, INC., a Corporation, et al., Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 1st and 2nd days of November, 1937 and the 2nd, 6th, 7th and 8th days of December, 1937, in the above-entitled Court, in Department 4 thereof, the Honorable Ruben S. Schmidt, Judge presiding, without a jury, a jury trial having been expressly waived by the parties hereto, the plaintiffs appearing by their attorneys, Aaron Sapiro and Samuel De Groot, Esqs., and the defendants, International Longshoremen's Association, Local No. 38-82, Inc., a corporation, Roy M. Donnelly, as President thereof, Francis G. Fetzer, as Secretary-Treasurer thereof, and Tom Provence, Joe Simons, C. W. Hanson, C. S. Pugh, A. Lindman, A. W. Springer, W. S. Lawrence, H. C. Viefhaus, R. Reedy, Dan Kelly Roy M. Donnelly and Francis G. Fetzer, as members of the Board of Directors of said International Longshoremen's Association, Local No. 38-82, Inc. appearing by their attorneys, John C. Packard and Charles J. Katz, Esqs. [fol. 62] Whereupon evidence both oral and documentary was introduced and after deliberating therein the Court makes its Findings of Fact and draws its Conclusions of Law therefrom, as follows:

Findings of Fact

I

That plaintiffs are and at all times herein mentioned have been members in good standing of the defendant corporation, International Longshoremen's Association, Local No. 38-82, Inc., a non-profit membership corporation, organized under the provisions of Article I, Title 12 of the Civil Code

of the State of California; and that the membership of the said corporation is composed of a large number of persons in excess of one thousand persons; and that these plaintiffs bring this action for and on behalf of themselves and as members of said corporation here suing in a representative capacity.

II

That it is true that defendant, International Longshoremen's Association, Local No. 38-82, Inc., is and for more than two years last past has been a non-profit corporation, formed under the provisions of Article I, of Title 12, of the Civil Code of the State of California, for the general purpose of conducting the usual activities of a labor union for and on behalf of longshoremen in the harbors of Los Angeles and Long Beach; and further that the office of the corporation is located at San Pedro, in the County of Los Angeles, [fol. 63] and that the residence of all of the said individual defendants is in the County of Los Angeles; and that said corporation is usually referred to as I. L. A. Local 38-82, and will be so referred to in these findings; that the defendant Roy M. Donnelly is, and during all the times herein mentioned has been President of the I. L. A., Local 38-82; that the defendant Francis G. Fetzer is, and during all the times herein-mentioned has been Secretary Treasurer of the I. L. A., Local 38-82; that the defendants Tom Provence, Joe Simons, C. W. Hanson, B. Franklin, C. S. Pugh, A. Lindman, L. Young, A. W. Springer, W. A. Lawrence, M. A. Anderson, V. Black, George Murphy, Tom Parker, H. C. Viefhaus, R. Reedy, Dan Kelly, H. L. Bowen, Roy M. Donnelly and Francis F. Fetzer are, and during all the times herein mentioned have been members of the Board of Directors of the I. L. A., Local No. 38-82.

III

That it is true that the I. L. A., Local 38-82, has been operating as a labor union under a charter granted to it by the International Longshoremen's Association, an unincorporated association, with its office at New York City, New York, affiliated with the American Federation of Labor; and the *the* I. L. A., Local 38-82, has filed Articles of Incorporation with the office of the Secretary of State of California, and that, among other things, said Articles of Incorporation set out the purposes for which the said corporation, Inter-

[fol. 64] national Longshoremen's Association, Local No. 38-82, Inc., has been formed, and that among such purposes are:

"* * * Second * * * 5. To conduct collective bargaining, either singly or jointly, with any other local union of the American Federation of Labor * * *."

"7. To do any and all lawful things and acts necessary or proper to effect the purpose of and to maintain the charter of the International Longshoremen's Association—Local No. 38-82, received from the American Federation of Labor * * *";

That it is true that all of the corporate activities of the said defendant corporation are limited to the purposes as are expressly set out in said subparagraph (5) and subparagraph (7) of said Article Second hereinabove in this numbered paragraph quoted. That it is true that at the time of the filing of the complaint herein said Articles of Incorporation had not been amended. This Court makes no Finding upon the question of whether any steps or proceedings have been taken to amend said Articles of Incorporation, or as to the validity or invalidity of any of said steps or proceedings had or taken under Sections 362, 362a and 362b of the Civil Code of the State of California, either prior to, or since the filing of the original complaint herein because this Court has considered and has restricted the issue as to [fol. 65] amendment to the sole question as to the power of the said defendant corporation to amend said Articles of Incorporation.

IV

That it is true that the said defendant officers and directors of the corporation have already taken action, and threaten to take further action, contrary to the said provisions of the Articles of Incorporation, and in direct violation thereof, in that (a) the said officers and Board of Directors have taken action, and threaten to take further action to cause the said I. L. A., Local No. 38-82 to become affiliated with the International Longshoremen's & Warehousemen's Union, for the purpose of conducting collective bargaining, and otherwise; and further, said defendant officers and Board of Directors have taken action, and threaten to take further action, to cause the said I. L. A., Local No. 38-82, to become affiliated with the Committee for Indus-

trial Organization; and further, the said defendant officers and Board of Directors have taken action, and threaten to take further action to have the I. L. A., Local No. 38-82,

affiliate with

[apply for, and receive, and accept a charter from][*] the Committee for Industrial Organization, commonly known as the C. I. O., and hereinafter referred to as the C. I. O.; and further, said defendant officers and Board of Directors have taken action, and threaten to take further action, to cause the said I. L. A., Local No. 38-82, to apply for a char-
[fol. 66] ter from and through the said International Longshoremen's & Warehousemen's Union; and further, said defendant officers and Board of Directors have failed to maintain and continue the payment of per capita charges to the International Longshoremen's Association of the Pacific Coast District No. 38, or nationally, as required by the charter and by the Constitution and By-Laws of the International Longshoremen's Association, and of the International Longshoremen's Association, Pacific Coast District No. 38 and of the I. L. A. Local 38-82; and it is true that the defendants have failed and threaten to continue to fail to maintain the charter of the I. L. A., Local No. 38-82, Inc.

V

That it is true that the International Longshoremen's & Warehousemen's Union, is a union recently organized on the Pacific Coast, under the direction of the C. I. O., and under the presidency of one Harry Bridges, former President of the International Longshoremen's Association, Pacific Coast District No. 38; that the said International Longshoremen's & Warehousemen's Union is usually referred to as the I. L. W. U., and will be so referred to in these findings; that the said I. L. W. U. is not affiliated with the American Federation of Labor in any respect, and that the I. L. W. U. is directly and publicly opposed to the American Federation of Labor, and to the organizations affiliated with the American Federation of Labor.

[fol. 67] VI

That it is true that the Committee for Industrial Organization is an unincorporated organization of representa-

[*] Matter enclosed in brackets stricken in copy.

tives of various labor unions, [most of which were at one time affiliated with the American Federation of Labor, and have deliberately broken away therefrom; and that the said C. I. O. has a Coast organization, of vague character, of which the said Harry Bridges is the Pacific Coast Director; and that the said C. I. O. organizes labor unions in opposition to the American Federation of Labor; maintains a constant public hostility against the American Federation of Labor; engages organizers, publicity men, labor agents and others to attempt to persuade existing labor unions to break their affiliation with the American Federation of Labor and join the said C. I. O.; and that the said C. I. O. maintains a Labor Council in the County of Los Angeles separate and distinct from the Labor Council of Los Angeles, formed and maintained by unions affiliated with the American Federation of Labor; and that the said C. I. O., in its national operations, in its Pacific Coast operations, in its Los Angeles County operations, in its operations as a C. I. O. Industrial Council of Los Angeles, and in its operations as the I. L. W. U.,]* and is openly and notoriously hostile to the American Federation of Labor, and antagonistic to the organizations that are still affiliated with the American Federation of Labor.

[fol. 68] VII

That it is true that the said defendant officers and Board of Directors have, on September 3, 1937, at a regular meeting, taken steps to apply for an I. L. W. U. charter, and have taken steps to arrange to pay the regular per capita tax to the I. L. W. U. and to the C. I. O. organizations; have already a have begun and [threaten to]* secure the said charter and to operate under the said I. L. W. U. and under the said C. I. O.; and that all of said actions constitute an express violation of the said Section 5 and Section 7 of Paragraph Second of the Articles of Incorporation of the I. L. A., Local No. 38-82; and further, that the said defendant officers and said directors have actually made payments in money, contrary to law, and in violation of the said provisions of the Articles of Incorporation, in that on or about September 4, 1937, a payment of Two Hundred and Fifty Dollars ($250.00) was sent by the said Francis G. Fetzer and the said Roy M.

* Matter enclosed in brackets stricken in copy.

Donnelly to the I. L. W. U. as a per capita tax, together with the application for the said I. L. W. U. charter; and further, that several checks have been sent and money has been paid to the said C. I. O. Industrial Council of Los Angeles County, including, among others, a check in the amount of Two Hundred and Fifty Dollars ($250.00) as a per capita tax, on or about August 20, 1937; and further, that during May, 1937, a check in the amount of Five Hundred Dollars ($500.00) was paid over to certain motion picture groups by the said Fetzer and the said Donnelly, for [fol. 69] the purpose of enabling the said motion picture groups to develop a C. I. O. organization movement in the motion picture industry; [and further, that at the time the said check was drawn, the said Fetzer openly stated, in the presence of many of the plaintiffs, that the money represented by the said check was being withdrawn illegally, but that he and Donnelly were going to send the money on to these motion picture crafts anyway;]* and further, that the said officers and Board of Directors have been authorizing payment, and have been paying to Don Cox and Elmer Mevert and John D. Thomas the amount of Sixty-three Dollars ($63.00) per week for each of them, as salary for work as C. I. O. organizers in Los Angeles County, under the direction and authority and action of the said officers and Board of Directors.

VIII

That it is true that said actions are illegal and constitute the doing of illegal actions, and the waste and use of such funds of the corporation for purposes contrary to the purposes set out in the said Articles of Incorporation of I. L. A., Local 28-82; and that said moves and actions to affiliate with the said I. L. W. U., and the said C. I. O., and the said C. I. O. Council, are all of them expressly in violation of the purposes set out in the Articles of Incorporation of the I. L. A., Local 38-82, particularly Section 7, where the express purpose is set out: "to do any and all lawful things and acts necessary or proper * * * to maintain [fol. 70] the charter of the I. L. A., Local No. 38-82, received from the American Federation of Labor * * * as a component labor union." That it is true that the said defendant officers and Board of Directors have deliberately acted

* Matter enclosed in brackets stricken in copy.

to refuse and fail to pay to the International Longshoremen's Association, Pacific Coast Branch No. 38 and the International Longshoremen's Association at New York, the per capita taxes which the said defendant, I. L. A., Local No. 38-82, is and has been obligated to pay; and that said failure and refusal to pay the said per capita tax has been adopted as a particular policy and action by the said defendant officers and directors for the express purpose of attempting to make the I. L. A. officials cancel or annul the said charter for failure to pay the per capita taxes, as required by the rules and law of the International Longeshoremen's Association; and that said failure and refusal to pay such per capita taxes, and that the adoption of said deliberate policy and the deliberate refusal and failure to pay, are in express violation of the provisions of the said Paragraph 7 of the purposes of the said corporation, in that it is a deliberate failure to do a thing necessary for the purpose of maintaining the charter of the I. L. A., Local 38-82, in the American Federation of Labor.

IX

That it is true that the said defendant, Donnelly, President, is a paid officer of the said corporation; that the said defendant, Fetzer, Secretary-Treasurer, is a paid officer of [fol. 71] the corporation; that the said defendants, Reedy and Simons, business agents, are paid officers of the corporation; and that the said defendants Pugh, Viefhaus and Hanson, dispatchers, are paid officers of the corporation, and that all of the said paid officers, [

]* have actually voted and taken specific steps to carry out these various activities, contrary to and in violation of the express provisions of Section 5 and Section 7, of Paragraph Second, of the Articles of Incorporation, hereinabove set forth.

X

That it is true that the defendant, I. L. A., Local 38-82, did, on or about May 25, 1935, legally adopt a set of by-laws. That it is true that the by-laws of the said I. L. A., Local No. 38-82, contain the following provision:

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* Matter enclosed in brackets stricken in copy.

"The Local shall never dissolve nor shall the funds of the Local be divided as long as ten members in good standing on the books object":

and this provision is similar to a provision in the Constitution of the International Longshoremen's Union, which states, under the head of "Rules for Locals":

"Rule 5. A local cannot withdraw from the International, or dissolve, as long as ten members in good standing object thereto":

and that the said Rule 5 is obligatory upon all Locals to [fol. 72] which charters have been issued and granted by the said International Longshoremen's Association; and that the plaintiffs are all members in good standing in the said I. L. A., Local No. 38-82; and that the plaintiffs have always abided by the charter and the Articles of Incorporation and the By-Laws of the said corporation; and that the said plaintiffs constitute more than ten members in good standing; and that the said plaintiffs have always maintained / and desire to maintain the charter of the I. L. A., Local 38-82 received from the American Federation of Labor.

XI

That it is true that the corporation has substantial assets approximating Fifty Thousand Dollars ($50,000.00) in value; and that the I. L. A., Local No. 38-82, had a gross income / prior to September, 1937 [at the present time]* of approximately Eight Thousand Dollars ($8,000.00) per month, and that most of the said funds are required for the operation of the I. L. A. Hall and the hiring hall and for the various other matters maintained by the I. L. A., Local 38-82, and that the funds on hand are being wasted by the said improper expenditures by the said defendant Officers and Board of Directors, and that the assets of the corporation are being dissipated, spent, consumed and used by such actions of the officers and Board of Directors improperly and illegally, without benefit to the corporation, and in violation of the Articles of Incorporation of

* Matter enclosed in brackets stricken in copy.

the said corporation. That it is true that if the said officers [fol. 73] and Board of Directors are not restrained from making such expenditures and continuing such expenditures, the income of the said corporation will not be sufficient to enable the corporation to carry on its proper activities for its members, and will result in a state of insolvency.

XII

That it is true that there is no manner of redress within the said defendant I. L. A., Local 38-82, Inc. for the plaintiffs or any of them, and that no remedy within the defendant corporation is provided by the Articles of Incorporation or by its Constitution and By-Laws, to enable the plaintiffs to stop the several actions or any of them hereinbefore described, within the defendant corporation.

XIII

That it is true that the defendant officers and the Board of Directors of I. L. A., Local 38-82, have deprived and are depriving the said plaintiffs and other members of the I. L. A., Local 38-82, of the rights and privileges to which they are entitled under their charter and under the Articles of Incorporation of the I. L. A., Local 38-82, and that the right of membership in the American Federation of Labor is an old and cherished right and privilege among American workmen; and that this right and privilege is one of the things which the officers and Board of Directors of the I. L. A., Local 38-82, were bound to maintain under the Articles [fol. 74] of Incorporation of said I. L. A., Local 38-82; and that the deprivation of these rights and other rights as a result of the said illegal and improper acts, has continued and is continuing. That it is true that if adequate redress is not immediately secured the rights which said plaintiffs and the other members of the said I. L. A., Local 38-82, have enjoyed will be entirely destroyed, and the plaintiffs and the other members of I. L. A., Local 38-82 will thereby be illegally deprived of important rights and privileges, [and will be prevented from the continuation of co-ordinated action and unified action with the other longshoremen and maritime workers of the Pacific Coast, and will be greatly weakened in the expression of all of their rights as .ork-ers],* and will lose valuable property rights by reason of

* Matter enclosed in brackets stricken in copy.

these illegal actions of the officers and Board of Directors of I. L. A., Local 38-82.

XIV

That it is true that said illegal acts as aforesaid by the defendants, the officers and Board of Directors of the I. L. A., Local 38-82, Inc., the plaintiffs and all members of the said I. L. A., Local 38-82, Inc. will suffer and will continue to suffer irreparable injury; and that no part of such injury can be paid for or compensated in money damages; and that substantial loss and irreparable loss and injury will follow.

XV

That it is true that plaintiffs have brought this action in [fol. 75] their representative capacity; and that they have been obliged to engage counsel and have become obligated therefore that no personal profit will come to any of the plaintiffs by reason of this action except the great profit and advantage which will come to them, and each of them, as members of the I. L. A., Local 38-82, Inc., by the protection of their charter and their Articles of Incorporation.

XVI

That it is true that the defendant members of the Board of Directors and officers have been guilty of gross mismanagement of the affairs of the said defendant corporation, I. L. A., Local 38-82, Inc. [* * *]* and it is true that the plaintiffs are entitled to an accounting from the said defendant officers and Board of Directors for all funds heretofore expended by them or on their order in violation of their duties as officers and members of the Board of Directors of said defendant corporation, I. L. A., 38-82, Inc.

XVII

That it is true that the said defendant officers and directors of the defendant corporation, I. L. A., Local 38-82, Inc. have set up and opened a new office for the I. L. W. U.; that said defendant officers and directors have caused to be transferred to the said I. L. W. U. the ordinary activities of the said I. L. A., Local 38-82, Inc. in reference to the opera- [fol. 76] tion of the I. L. A. hall, and participating in the

* Matter enclosed in brackets stricken in copy.

operation of a hiring hall and that the said officers and directors have caused the said I. L. A., Local 38-82, Inc. to abandon and cease its operations and functions as an I. L. A. hall; and that the said I. L. A., Local 38-82, Inc. is not now operating or participating in the operation of a hiring hall or sending men out to work under the working agreements with the employers of the defendant corporation, I. L. A., Local 38-82, Inc., or otherwise.

XVIII

That it is true that the said officers and directors have caused the said I. L. A., Local 38-82, Inc. to cease collecting dues or funds from the members thereof and have caused the income of the said I. L. A., Local 38-82, Inc. to stop completely, since September 3, 1937.

XIX

That it is true that the said officers and directors have caused the actual premises occupied by the said I. L. A., Local 38-82, Inc. to be practically abandoned, and that the dispatchers, stenographers, office help and others who were formerly busy with the business of the said I. L. A., Local 38-82, Inc. at the office and premises of the corporation I. L. A., Local 38-82, Inc., are no longer present at the said premises and have not been present at the said premises since from on or about October 15, 1937; and that, by reason of the action of the said officers and directors, the said premises now constitute a hall, wherein men may look in and move about, but where no business whatsoever is conducted and where no functions or business of the said I. L. A., [fol. 77] Local 38-82, Inc. is now being performed; and where no functions of the hiring and dispatching of men for employment are now being carried on; and where no functions of the corporations, such as the collection of dues and the conservation of funds are now being carried on; and that the said premises of the I. L. A., Local 38-82, Inc. are actually and completely abandoned as far as any operations or activities of the said corporation, I. L. A., Local 38-82, are concerned.

XX

That it is true that since the filing of the said complaint the said officers and directors attempted to cause the shipowners and others, employers of members of the said I. L.

A., Local 38-82, Inc. to recognize the said I. L. W. U. as the representative of the employees under the working contracts of the said I. L. A.; and that the working contracts stand in the name of the I. L. A., Pacific Coast District No. 38, for and on behalf of the locals of the I. L. A.; and that the said officers and directors are still making various attempts to cause the control and administration of the said working contracts to be transferred or taken over by the said I. L. W. U.

XXI

That it is true the said officers and directors have caused the members of the said I. L. A., Local 38-82, Inc. to take action to accept a charter from the said I. L. W. U. and to [fol. 78] set up a local union of the said I. L. W. U. at San Pedro, and to take over into the said union the ordinary activities of the said I. L. A., Local 38-82, Inc.

XXII

That it is true the Articles of Incorporation attached to defendants' answer, marked "Exhibit A" is a true and correct copy of the Articles of Incorporation of said defendant, I. L. A., Local 38-82, Inc.

XXIII

That it is true the defendant, I. L. A., Local 38-82, Inc. has been operating as a labor union under a charter granted to it by the I. L. A., an unincorporated association affiliated with the American Federation of Labor; that said charter was originally granted by the I. L. A., an unincorporated association, to the I. L. A., Local 38-82, an unincorporated association, which unincorporated association was succeeded by the defendant corporation, I. L. A., Local 38-82, Inc., which corporation was formed for the purpose of incorporating the I. L. A., Local 38-82, an unincorporated association, pursuant to the laws of the State of California and particularly Section 594 of the Civil Code of the State of California; that it is not true the defendant corporation, I. L. A., Local 38-82, Inc. carries on its business as a labor union independent of any charter from said I. L. A., an unincorporated association.

XXIV

That it is not true the said Articles of Incorporation of [fol. 79] the defendant I. L. A., Local 38-82, Inc. have ever

been amended, and in this connection it is not true the alleged amendment set forth in Paragraph III of defendants' answer, commencing on page three, line sixteen, continuing through to line twenty-nine, was ever adopted by the defendant corporation, I. L. A., Local 38-82, Inc. or the members thereof.

XXV

That it is not true the defendants, as officers and as members of the Board of Directors of the defendant corporation, I. L. A., Local 38-82, Inc., pursuant to instructions, directions and resolutions of the overwhelming majority or of any of the members of the defendant corporation, are seeking affiliation with the I. L. W. U., but that said action was taken by the defendant officers and members of the Board of Directors of the defendant corporation by their own volition and not by the vote of the members of the defendant corporation in any legal membership meeting; that such action on the part of the defendant officers and members of the Board of Directors in seeking such affiliation was illegal and contrary and in violation of a temporary restraining order and an injunction pendente lite issued out of this Court in this case, and in violation of the Articles of Incorporation of defendant corporation.

XXVI

That it is not true that each and every payment of money made by the defendants was made pursuant to the direction [fol. 80] and with the full knowledge and consent of the overwhelming majority or any majority of the members of the defendant corporation.

XXVII

That it is not true the defendants have failed to pay the per capita tax to the I. L. A. pursuant to the direction of the majority of the members of the defendant corporation.

XXVIII

That it is not true every expenditure described in plaintiffs' complaint has been expressly ratified by, and consented to, by the vote of the overwhelming majority or any other majority of the members of the defendant corporation; and that in making such expenditures and each of them, the

defendants did act in accordance with the express desire and direction of the overwhelming or any other majority of the members of the defendant corporation; but it is true that the making of any expenditures was illegal and void.

XXIX

That it is not true the acts complained of by the plaintiffs of the defendant officers and members of the Board of Directors of the defendant corporation, I. L. A., Local 38-82, Inc., were expressly consented to by the vote of the majority of the members of the defendant corporation.

[fol. 81]

XXX

That it is true an actual controversy exists between the plaintiffs and cross-defendants and the defendant and cross-complainant, I. L. A., Local 38-82, Inc. under said Articles of Incorporation of the defendant corporation, I. L. A., Local 38-82, Inc., and that said defendant and cross-complainant desires a declaration of its rights or duties with respect to subparagraphs 5 and 7 of Article 2nd of said Articles of Incorporation.

XXXI

That it is true the said defendant and cross-complainant may amend its Articles of Incorporation in accordance with the laws of the State of California pursuant to "Amendment of Articles" as provided in the Civil Code of the State of California, and the by-laws and Constitution of the said defendant and cross-complainant, I. L. A., Local 38-82, Inc.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following conclusions:

I

That the actions of the defendant officers and the Board of Directors of the defendant corporation, International Longshoremen's Association, Local 38-82, Inc. in attempting to secure or securing a charter or in attempting to have or in having any affiliation with the Committee for In-
[fol. 82] dustrial Organization or with the Committee for Industrial Organization, Pacific Coast District, or with the International Longshoremen's & Warehousemen's Union

or with the Committee for Industrial Organization Industrial Council of Los Angeles, be and are declared void, illegal, improper and beyond the powers of the said corporation and as having no legal force and effect.

II

That the acts of the said officers and Board of Directors of the International Longshoremen's Association, Local 38-82, Inc. in authorizing and making expenditures to or on behalf of the said Committee for Industrial Organization or to or on behalf of the said Committee for Industrial Organization, Pacific Coast District or to or on behalf of the said International Longshoremen's & Warehousemen's Union, or to or on behalf of the Committee for Industrial Organization Industrial Council of Los Angeles, or to or on behalf of the said Don Cox, Elmer Mevert and J. D. Thomas, organizers for the Committee for Industrial Organization, be and are declared null and void and improper and beyond the powers of the said corporation and without warrant or justification.

III

That the said defendant officers and directors of said corporation, Roy M. Donnelly, as President, Francis G. Fetzer, as Secretary-Treasurer thereof, and Tom Provence, [fol. 83] Joe Simons, C. W. Hanson, B. Franklin, C. S. Pugh, A. Lindman, L. Young, A. W. Springer, W. S. Lawrence, M. A. Anderson, V. Black, George Murphy, Tom Parker, H. C. Viefhaus, R. Reedy, Dan Kelly, H. L. Bowen, Roy M. Donnelly and Francis G. Fetzer as directors have been guilty of deliberate violation of the Articles of Incorporation of the defendant corporation.

IV

That the defendant officers and directors of the said corporation shall account to the defendant corporation, International Longshoremen's Association, Local 38-82, Inc. for all funds of the said corporation expended by them or under their authority, in violation of the Articles of Incorporation and shall restore all funds expended by them or under their authority.

V

That the injunction pendente lite heretofore issued in this Court shall be made permanent.

VI

That the defendant officers and directors of the defendant corporation and/or their successors in office and the defendant corporation shall take all steps that may be necessary to maintain the charter of the International Longshoremen's Association, Local 38-82, Inc. in the American Federation of Labor, in accordance with the Articles of Incorporation of the defendant corporation, which shall include the payment of per capita taxes.

[fol. 84]

VII

That a receiver shall be appointed for the purpose of conducting and administering the affairs of the defendant corporation, International Longshoremen's Association, Local 38-82, Inc. in accordance with the obligations of the charter and the Articles of Incorporation of the said defendant and the contract obligations of the defendant corporation, which receiver shall operate under the direction of this Court, and that said receiver shall be empowered with all duties and rights to carry on the obligations and duties of the defendant corporation, International Longshoremen's Association, Local 38-82 Inc. in accordance with the charter and the Articles of Incorporation and agreements of the said defendant corporation International Longshoremen's Association, Local 38-82, Inc.

VIII

That the cross-complainant has the right and the power to amend its Articles of Incorporation; and that, by complying with the provisions of Sections 362, 362a and 362b of the Civil Code of the State of California, it may amend its Articles of Incorporation for any or all of the purposes provided by Section 362 of the Civil Code of the State of California.

IX

That plaintiff shall be awarded their costs of suit incurred herein.

Done in open court this 21st day of January, 1938.

Ruben S. Schmidt, Judge.

[fol. 85] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

In the Matter of H. R. BRIDGES, sometimes known as HARRY R. BRIDGES, In Contempt

AFFIDAVIT OF CHARLES E. SHARRITT

STATE OF CALIFORNIA
County of Los Angeles, ss.

CHARLES E. SHARRITT, being by me first duly sworn, deposes and says:

Affiant is informed and believes and upon such information and belief alleges that H. R. Bridges, who is also known as Harry R. Bridges, is now and at all times herein mentioned was the President of the International Longshoremen's and Warehousemen's Union, a voluntary, unincorporated association consisting of local unions of longshore, warehouse and other workers, which local unions are situated in the various parts of the Pacific Coast and elsewhere and thousands of whom are longshoremen employed at long-shore work in the various ports of the Pacific Coast; these longshore workers employed in Pacific Coast ports are organized into local unions which comprise District No. 1 of said International Longshoremen's and Warehousemen's Union; that said H. R. Bridges is now [fol. 86] and at all times herein mentioned was President of said District No. 1 of said International Longshoremen's Union.

Affiant is informed and believes and upon such information and belief alleges that said International Longshoremen's and Warehousemen's Union and all of the local unions organized thereunder and connected therewith are affiliated with the Committee for Industrial Organization, commonly known as the C.I.O., or with the Committee for Industrial Organization, Pacific Coast District.

Affiant is further informed and believes and upon such information and belief alleges that James D. O'Neil is the publicity agent for said Committee for Industrial Organization, Pacific Coast District, and for said International Longshoremen's and Warehousemen's Union, District No. 1 thereof.

Affiant is informed and believes and upon such information and belief alleges that on or about the 24th day of

January, 1938, the said H. R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States, at Washington, D. C., which said telegram, contained words and figures as follows, to-wit:

"This decision is outrageous considering I.L.A. has 15 members (in San Pedro) and the International Longshore- [fol. 87] men-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

That affiant is informed and believes and upon such information and belief alleges that said H. R. Bridges on said 24th day of January, 1938, or about the time of the sending of said telegram to said Frances Perkins, caused a copy thereof to be given to said James D. O'Neil for the purpose and with the intent that the contents of said telegram [fol. 88] should and would be furnished to and published in newspapers on the Pacific Coast and elsewhere.

Affiant is informed and believes and upon such information and belief alleges that said James D. O'Neil, acting as such publicity agent for said International Longshoremen's and Warehousemen's Union District No. 1 and pursuant to the express instructions of said H. R. Bridges and with his consent, gave said telegram to a newspaper reporter, or newspaper reporters, the name or names of whom are unknown to affiant.

That on or about the 24th and 25th days of January, 1938, excerpts from said telegram which are hereinabove set forth, were published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles in the State of California, and the sending of said telegram and the contents thereof were thus made public and re-

ceived wide and general publicity in the County of Los Angeles and elsewhere.

That on the date that the contents of said telegraphic message sent by said H. R. Bridges to said Frances Perkins, as aforesaid, was released for publication by said H. R. Bridges and said James D. O'Neil, as aforesaid, there was pending and undetermined before the Honorable Ruben S. Schmidt, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, a certain [fol. 89] action entitled "P. W. Walker, et al., plaintiffs, vs. International Longshoremen's Association, Local 38-82, Inc., a corporation, et al., defendants," known as No. 420356 in the Superior Court of the State of California, in and for the County of Los Angeles, all as will more particularly appear from the affidavit of L. E. Lampton, subscribed and sworn to by him on the 24th day of February, 1938, and filed herein concurrently herewith, reference to which said affidavit is hereby made for further particulars.

Affiant is informed and believes and upon such information and belief alleges that the "decision" referred to in said telegram as "outrageous" is the judgment, and the order appointing a receiver contained therein, and the permanent injunction, signed and filed in said action No. 420356 on January 21st, 1938, by said Honorable Ruben S. Schmidt.

Affiant is informed and believes and upon such information and belief alleges that "I.L.A." as used in said telegram refers and was intended to refer to International Longshoremen's Association—Local 38-82, Inc., a corporation.

Affiant is informed and believes and upon such information and belief alleges that the "Schmidt decision" referred to in said telegram is the judgment and permanent injunction made and entered in said action No. 420356.

[fol. 90] Affiant is informed and believes and upon such information and belief alleges that International Longshoremen-Warehousemen Union referred to in said telegram as having 3000 members in San Pedro, is composed of those members of International Longshoremen's Association, Local No. 38-82, Inc., a corporation (one of the defendants in said action No. 420356), who are affiliated with and are members of said C. I. O. organization, and who were at the date of the publication of said telegram members of International Longshoremen's and Warehousemen's Union Local 1-13;

that said Local 1-13 is the San Pedro, California, local of said International Longshoremen's and Warehousemen's Union, District No. 1; that the "International Longshoremen-Warehousemen Union", which said Bridges stated in said telegram "has petitioned the labor board for certification to represent San Pedro longshoremen", and which said Bridges stated in said telegram "does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board" is International Longshoremen's and Warehousemen's Union, District No. 1, of which said H. R. Bridges is now and at all times herein mentioned was president, as aforesaid, and the statement in said telegram that said International Longshoremen-Warehousemen Union "does not intend to allow state courts to over-[fol. 91] ride the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board" was meant and was intended by said Bridges to mean that said International Longshoremen's and Warehousemen's Union District No. 1, and said International Longshoremen's and Warehousemen's Union Local 1-13, and the respective members of said organizations, did not intend to observe, abide by or be bound by judgments or orders theretofore rendered and made by said Ruben S. Schmidt, as Judge of said Superior Court in said action No. 420356, and unless any judgment or order thereafter to be made by said Ruben S. Schmidt, as Judge of said court, in connection with matters then pending before him as Judge of said court in said action No. 420356 should uphold and conform to the contentions of said two last mentioned unions, they and their respective members would not observe, abide by, or be bound by any subsequent judgment or order made by said Judge in said action; and the said statement in said telegram with reference to the overriding by state courts or the majority vote of members in choosing its officers and representatives referred, and was by said Bridges intended to refer, to the judgment theretofore rendered in said action No. 420356 by said Ruben S. Schmidt, as judge of said Superior Court, in which said judgment a receiver was appointed for International Longshoremen's [fol. 92] Association, Local 38-82, Inc., a corporation, and to the permanent injunction made and issued in said action by said judge; and the publication of the contents of said telegram to said Frances Perkins was calculated and in-

tended by said H. R. Bridges to influence the said Ruben S. Schmidt in the decision of the matters pertaining to said action pending before him on the date upon which the contents of said telegram were published, to-wit, a motion for a new trial in said action, a motion to vacate the judgment and decision theretofore made and entered therein, and the appointment of a receiver for said International Longshoremen's Association, Local 38-82, Inc., a corporation, provided for in said judgment, and to vacate the permanent injunction made and entered in said action; and the contents of said telegram, as hereinabove set forth, were put in the course of publication by said H. R. Bridges for the purpose of influencing the said Ruben S. Schmidt to make an order granting a new trial in said action, or to vacate said judgment and decision and discharge said receiver or vacate said permanent injunction theretofore made and entered in said action.

That the statements contained in said telegram and the publication of the fact of sending said telegram and the publication of the contents thereof as aforesaid were in and [fols. 93-110] of themselves calculated and had inherent tendency to:

(1) Interfere with, influence, sway and control the proceedings in said action No. 420356, and interfere with, sway, control, embarrass and influence the actions and decisions of said Ruben S. Schmidt acting as a judge of said Superior Court;

(2) Interfere with the orderly and due administration of justice in said action;

(3) Bring about and cause the vacation of the judgment theretofore made by said Ruben S. Schmidt and the appointment of a receiver for said International Longshoremen's Association, Local 38-82, Inc., a corporation, provided for in said judgment, and a vacation of the permanent injunction theretofore rendered and entered in said action, and to cause said judge to grant a new trial in said action, or to modify said judgment, or said permanent injunction.

Charles E. Sharritt.

Subscribed and sworn to before me this 24th day of February, 1938. Ernestine Stahlhut, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 111] EXHIBIT "B" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, in Contempt

ORDER TO SHOW CAUSE

It appearing to the Court that an order to show cause was made by this Court on the 24th day of February, 1938, in the above entitled matter requiring the said H. R. Bridges, sometimes known as Harry R. Bridges, to show cause in this Court on the 17th day of March, 1938, why he should not be punished for contempt, and that it has been impossible to serve said order to show cause upon the said H. R. Bridges because of his absence from the State of California; and

It Further Appearing to the Court that an order to show cause was made by this Court on the 17th day of March, 1938, in the above entitled matter, requiring the said H. R. Bridges, to show cause in this Court on the 29th day of April, 1938, why he should not be punished for contempt, and that it has been impossible to serve said order to show cause upon said H. R. Bridges because of his absence from the State of California; and

It Further Appearing to the Court that an order to show cause was made by this Court on the 30th day of April, 1938, in the above entitled matter, requiring the said H. R. Bridges, sometimes known as Harry R. Bridges, to show [fol. 112] cause in this Court on the 24th day of May, 1938, why he should not be punished for contempt, and that it has been impossible to serve said order to show cause upon said H. R. Bridges because of his absence from the State of California, and inability of process servers to serve him:

Now, in consideration of the premises, and upon reading the affidavits of L. E. Lampton, J. Louis Elkins, Charles E. Sharritt and A. G. Stanham and the exhibits attached thereto, which affidavits were filed herein on February 24, 1938, and good cause appearing therein for this order,

It is Hereby Ordered that said H. R. Bridges, sometimes known as Harry R. Bridges, do be and appear before the above named Superior Court in Department No. 1, at the hour of 10:00 o'clock A. M. on the 24th day of June, 1938,

then and there to show cause, if any there be, why he should not be adjudged guilty of contempt of Court and punished therefor by reason of the acts and each of the acts set forth in the said affidavits and alleged to have been committed by him, reference to said affidavits being hereby made for particulars of the acts charged.

And it is Further Ordered that this order to show cause and all of the above mentioned affidavits on file herein be served upon the said H. R. Bridges on or before the 17th day of June, 1938, by delivering a copy of this order to show cause and a copy of said affidavits to the said H. R. Bridges personally.

Dated this 24th day of May, 1938.

Ruben S. Schmidt, Judge of the Superior Court.

[fol. 113] EXHIBIT "C" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of HARRY R. BRIDGES, In Contempt

MOTION TO QUASH ORDER TO SHOW CAUSE IN RE CONTEMPT

To the Honorable Judge Presiding:

You will hereby please take notice that the respondent, H. R. Bridges, will by his counsel, Messrs. A. L. Wirin, Ben Margolis and Charles J. Katz, in Department 22 of the above entitled court, on the 13th day of July, 1938, at the hour of 9:00 o'clock A. M., or at such other place and time as that certain order to show cause in re contempt dated the 24th day of May, 1938, may be heard, move the said court to quash and recall said order to show cause dated May 24th, 1938 issued by the Honorable Ruben S. Schmidt, Judge.

Said motion will be made upon the following grounds:

First. That the above entitled court has no jurisdiction to hear or determine said order to show cause, in that the affidavits filed in support thereof, and the facts averred in support of, and for the issuance of, said order to show cause, are not sufficient to confer jurisdiction upon the said above

entitled court to hear and determine said order to show [fol. 114] cause, and that the facts in support of, and upon which said order to show cause were issued, do not constitute contempt.

Second. That said order to show cause, and this entire proceeding in contempt, is violative of the provisions of the Fourteenth Amendment to the Constitution of the United States of America, and of the provisions of Sections 9, 10, 11 and 21 of Article I of the Constitution of the State of California, as now in full force and effect, in that these proceedings do deprive the respondent herein of his liberty and property without due process of law, and do deny to the respondent herein the equal protection of the law, in this:

I

With respect to the first count set forth in said proceedings in contempt:

(1) That, as appears from the affidavit on file herein signed by Louis Elkins, Executive Secretary of the Los Angeles Bar Association, the respondent H. R. Bridges is the President of the International Longshoremen's and Warehousemen's Union (hereinafter referred to as the I. L. W. U.). It further appears from the findings of fact and judgment (a copy of which findings of fact and judgment is made a part of the order to show cause in re contempt herein) rendered in the action entitled "P. W. [fol. 115] Walker, et al., v. International Longshoremen's Association, Local 38-82, Inc., a corporation", cause Number 420356, that the officers and directors of the defendant incorporated union sought to affiliate with the said I. L. W. U.; it further appears from said judgment and findings of fact that the said I. L. W. U. was operating the hiring hall, and that the defendant incorporated union was not operating or participating in the operation of the said hiring hall, or sending men out to work under the working agreements with the ship owners (see finding of fact number 17); that as appears from said findings of fact and judgment, the basic question involved in said action was the effect of the Articles of Incorporation of the defendant incorporated union upon the desired transfer of affiliation from the American Federation of Labor to the Committee for Industrial Organization the said I. L. W. U. was a member and affiliate; that

pursuant to the provisions of the said judgment in action Number 420356, the court appointed a receiver to perform the following, among other acts (judgment page 3, lines 10-30);

[fol. 116] "To carry out the obligations and duties imposed upon the said corporation and to exercise the privileges and rights conferred upon the said corporation by any agreements, particularly with employers, and to carry out such agreements with and through the members of the said corporation as and where provided in such agreements; and to take possession of the I. L. A, Local 38-82 meeting hall; and to participate actively in control of the San Pedro hiring hall and to carry out the working agreements through the members in good standing in said International Longshoremen's Association, Local 38-82; and to take all necessary steps to cause the International Longshoremen's & Warehousemen's Union to pay over to the said International Longshoremen's Association, Local 38-82 all funds heretofore collected by it as dues from members or former members of the said International Longshoremen's Association, Local 38-82 during any period in which the said International Longshoremen's & Warehousemen's Union assumed and took control of employment or operations under any of said agreements of International Longshoremen's Association, Local 38-82."

[fol. 117] That the said I. L. W. U. was not made a party defendant in said action Number 420356, and did not appear therein, and that as shown hereinabove, that the said I. L. W. U. was actually operating the hiring hall referred to; that without notice to it, the said receiver so appointed by the court was directed to take over said hiring hall and to carry out through said hiring hall the existing working agreements with the ship owners by members in good standing of the I. L. A. Local 38-82, Inc., thereby excluding from the use of said hiring hall and from the benefits of said agreements with the shipowners, and from their employment the longshoremen who transferred their affiliation to the I. L. W. U.

That at the time of the filing of the affidavit of H. R. Bridges, which affidavit forms the basis of the alleged contempt charged in Count One hereof, that there was pending in said cause Number 420356 a motion to vacate the said judgment appointing said receiver, and the findings of fact

and conclusions of law in support thereof; that as appears from the face of said motion to vacate the judgment, that said motion was noted as being one which would be made by [fol. 118] affidavits; that supporting affidavits constitute the proper legal method for moving to vacate a judgment appointing a receiver; that said affidavit of H. R. Bridges was a proper legal step necessary to set in operation the said motion to vacate said judgment in action Number 420356, and was properly filed therein, and was not a gratuitous act, and was not an improper act in and of itself; that as President of said I. L. W. U., the said H. R. Bridges, as part of his duties and his work as a labor official, knew the history of the struggle of the longshoremen for a hiring hall operated by representatives duly elected by a majority of the registered longshoremen, and knew the prime importance of the hiring hall to the longshoremen in their day to day labor, as well as the natural effect upon said longshoremen of any act of the court which would cause or might tend to cause any loss of control by the majority of the longshoremen of their own operations of the hiring hall; that said hiring hall is not property in any real or corporeal sense, but is the method by which longshoremen collectively bargain with and carry out their working agreements with the ship owners.

[fol. 119] That it was part of the business of, and part of the duty of the said H. R. Bridges, as such president of the said I. L. W. U., to advise the court of the said history and the said facts concerning said hiring hall and the effect of the taking away from the men of control thereof by representatives of their own choosing, and the effect of any act of the court in substituting for control by a majority of the men controlled by a receiver appointed by the court; that since a motion to vacate the order appointing a receiver was pending, the only appropriate or legal way to so advise the court was by an affidavit, and that such an affidavit was so filed in said cause Number 420356, and is now part of the files therein.

That the work of a labor leader is a proper and lawful calling; that filing an affidavit in a pending cause in a court where affidavits are permitted, is a lawful and proper act, and that there is no valid statute or ordinance prescribing either of said acts; that Count One in this proceeding in contempt has for its purpose punishment by imprisonment or fine, or both, of the said H. R. Bridges for the perform-

ance by him in a lawful manner of a lawful act, which was part of the duties and business of said H. R. Bridges, thus [fol. 120] depriving the said H. R. Bridges of his liberty and property without due process of law.

II

With respect to the Second Count in said proceedings in contempt:

(1) As appears affirmatively from the records in said Los Angeles Superior Court action Number 420356, a collective bargaining agreement exists between the various water front employers and the longshoremen on the Pacific Coast, and that by the terms of said agreement it is provided, among other things, that in case of a dispute, that the aid of the Department of Labor of the United States could be called upon; that it is the function of the Department of Labor of the United States, as provided by the provisions of Section 51 of Chapter 5 of Title 29 of the Code of the Laws of the United States of America, to act as mediator and to appoint commissioners of conciliation in labor disputes whenever, in the opinion of the Secretary of Labor, the interests of industrial peace may require it to be done; that the order appointing a receiver in case Number 420356 had the inherent tendency to effect the interests of industrial peace and the existing collective bargaining agreement with the [fol. 121] ship owners; that in Count Two in this proceeding in contempt, the unlawful act complained of is the sending of a telegram to the Secretary of Labor and the publication thereof by H. R. Bridges; that by this proceeding in contempt and Count Two thereof, it is sought to punish by imprisonment and/or fine, and/or by both, the said H. R. Bridges for his act in sending a telegram to the Secretary of Labor, in the Cabinet of the President of the United States, and that any such fine or imprisonment does constitute a deprivation of the liberty and property of the said H. R. Bridges without due process of law.

(2) That for the same causes and reasons, that said Second Count of said proceedings in contempt deprives the said H. R. Bridges of his liberty and property without due process of law, that said Count Two of said proceedings in contempt constitutes an unlawful abridgement of the constitutional guaranty of free speech of the said H. R. Bridges.

(3) That for the same causes and reasons as are set forth in sub-paragraphs (1) and (2) immediately hereinabove, that said Count Two of said proceeding in contempt constitutes an unlawful abridgement of the constitutional right [fol. 122] of the said H. R. Bridges to petition the government for a redress of grievances.

III

With respect to Count Three in said proceedings in contempt:

(1) As appears affirmatively from said Count Three, the said H. R. Bridges is alleged to have made open and public threats that a coastwise strike of the maritime workers on the Pacific Coast would be called, as a result of the orders and judgments made in said action Number 420356, and it is further alleged in said Count Three in said proceedings in contempt that the said H. R. Bridges did call a strike on January 28th, 1938, and that the members of the said I. L. W. U. were out on strike for one-half day on January 28, 1938, that assuming each of said allegations to be true for the purpose of this motion to quash, that said acts are, and each of them is, but the exercise of the right of free speech and free assemblage, and that each of said acts is a lawful act which cannot be rendered unlawful because of the motive alleged to have inspired each of such acts; that this proceeding in contempt and this attempt by Count Three thereof to punish by fine and/or imprisonment, or [fol. 123] both, the said H. R. Bridges for said acts, is an abridgement of the constitutional guaranty of free speech and free assemblage.

IV

With respect to this entire proceeding in contempt, and the three counts therein described, that said counts and each of them, and this entire proceeding in contempt is based upon the holding of an alleged strike and alleged threats to strike, and an affidavit containing alleged statements to the effect that the longshoremen of the Pacific Coast would not work unless they could retain control over their own hiring halls; that each of the acts and statements alleged in each of said counts of the within contempt proceedings are lawful and proper acts and statements; that an alleged threat to commit a lawful act is in itself a law-

ful act, embraced within the constitutional guaranty of liberty and property and due process of the Fourteenth Amendment to the Constitution of the United States, and of Sections 9, 10, 11 and 21 of Article I of the Constitution of the State of California; that the right to strike and the right to make an alleged threat of a strike, where a cessation of work is necessary consequence of a judicial decree, is guaranteed by the Thirteenth Amendment to the Constitution of the United States, and by Section 18 of Article I of the Constitution of the State of California, prohibiting [fol. 124] involuntary servitude, and will deny to the respondent due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Sections 9, 10, 11 and 21 of Article I of the Constitution of the State of California.

V

That said order to show cause in re contempt, and each of the counts of contempt therein referred to, arises out of and is a result of that portion of the judgment rendered in Los Angeles Superior Court action No. 420356, appointing a receiver over the defendant incorporated union and empowering said receiver to perform the following duties:

"To carry out the obligations and duties imposed upon the said corporation and to exercise the privileges and rights conferred upon the said corporation by any agreements, particularly with employers, and to carry out such agreements with and through the members of the said corporation as and where provided in such agreements; and to take possession of the I. L. A., Local 38-82 meeting hall; and to participate actively in control of the San Pedro hiring hall and to carry out the working agreements through the members in good standing in said International Longshoremen's Association, Local 38-82 * * *."

[fol. 125] That each and all of the aliegedly contemptuous acts committed by the respondent arises out of, and was directly connected with the said order appointing receiver and empowering the said receiver to perform the acts hereinabove particularly set forth; that the above entitled court did not have jurisdiction so to do, and does not now have jurisdiction to appoint a receiver to perform the aforesaid acts, and that the appointment of said receiver by the court for the purposes and with the powers aforesaid was an in-

vasion of the sole and exclusive jurisdiction of the National Labor Relations Board to determine and designate the collective bargaining agent for employees in a given unit; that the sole and exclusive jurisdiction over the subject matter of the said order appointing receiver was vested in courts other than the Superior Court of the State of California, and that the said Superior Court of the State of California had no jurisdiction over the subject matter thereof, and that the instant contempt proceedings arising out of a cause wherein the court had no jurisdiction is likewise a proceeding in which this court has no jurisdiction.

That there is a defect of parties plaintiff in said proceedings in that this is a criminal proceeding, and the proper party plaintiff should be the People of the State of California vs. H. R. Bridges, sometimes known as Harry R. Bridges; and that the court is without jurisdiction to pro-[fol. 126] ceed because of the absence in said proceedings of the attorney general of the State of California, and/or the district attorney of the County of Los Angeles, and/or the failure of the said attorney general and the said district attorney to appear and prosecute said action.

That the failure of the appearance of said prosecuting officials, as aforesaid, and the prosecution of the defendant herein by private citizens constitutes a denial of due process of law as guaranteed to the defendant by the Fourteenth Amendment to the Constitution of the United States.

VII

That this motion will be based upon the records, files and pleadings in Los Angeles Superior Court action Number 420356, and pleadings in Los Angeles Superior Court action Number 423220, and upon this motion, and upon such affidavits as may be filed at the time of the hearing hereof.

Dated This — day of July, 1938.

A. L. Wirin, Ben Margolis, Charles J. Katz, By A. L. Wirin, Attorneys for H. R. Bridges.

[fol. 127] EXHIBIT "D" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, In Contempt

DEMURRER TO ORDER TO SHOW CAUSE IN RE CONTEMPT

Comes now the respondent, H. R. Bridges, sometimes known as Harry R. Bridges, and for cause of demurrer to that certain order to show cause in re contempt, dated the 24th day of May, 1938, issued by the Honorable Ruben S. Schmidt, Judge of the Superior Court, and the affidavits in support thereof, said affidavits and order to show cause constituting the complaint herein, and respectfully alleges:

* * * * * * *

[fols. 128-133] III

That neither the said order to show cause, nor any part thereof, including the affidavits in support thereof, states facts sufficient to constitute a contempt, in that the same, and the whole thereof, appears upon its face to be violative of the provisions of the Fourteenth Amendment to the Constitution of the United States of America, and the provisions of Section 9, 10, 11 and 21 of Article I of the Constitution of the State of California, in that these proceedings deprive the respondent of his liberty and property, without due process of law, and do deny to the respondent the equal protection of the law.

* * * * * * *

[fols. 134-160] Wherefore, the respondent prays that this demurrer be sustained without leave to amend.

A. L. Wirin; Ben Margolis; Charles J. Katz. By Charles J. Katz, Attorneys for Respondent.

* * * * * * *

[fol. 161] EXHIBIT "F" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, In Contempt

ANSWER OF H. R. BRIDGES, SOMETIMES KNOWN AS HARRY R. BRIDGES

Comes now the defendant, H. R. Bridges, sometimes known as Harry R. Bridges, and answers the order to show cause, and the affidavits in support thereof, as follows:

With respect to the affidavit of J. Louis Elkins, and counts two and three thereof, answers as follows:

Second Count

Answering the allegations set forth on page 5 of said affidavit of J. Louis Elkins, commencing on page 28 thereof, and continuing through and including line 16 at page 7 thereof, this defendant denies each and all of said allegations and averments therein set forth, excepting only that the defendant admits that James D. O'Neal was the publicity agent for the International Longshoremen's and Warehousemen's Union, and excepting only that the defendant admits that the excerpts of said telegram were published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, and admits that the sending of said telegram was made public and received wide and [fol. 162] general publicity, but in this connection defendant denies that he did any act in connection with said telegram or the publication thereof, excepting to cause the same to be sent to Frances Perkins, in the ordinary and regular course of the lawful business and duties of this defendant as President of the said I. L. W. U.; further affirmatively answering the averments set forth in said second count, this defendant affirmatively avers that pursuant to the provisions of the collective bargaining agreement between the waterfront employers and longshoremen of the Pacific Coast, (which collective bargaining agreement is now an exhibit on file in these proceedings), that the offices of the

Department of Labor of the United States of America might be called upon for assistance in labor disputes or questions involving the cessation of work; that further and pursuant to the provisions of Section 51 of Chapter 5 of Title 29 of the United States Code Annotated, the Secretary of Labor has power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in the judgment of the Department of Labor the interests of industrial peace may require it to be done: further, defendant affirmatively alleges that by long and constant practice inaugurated by the Department of Labor of the United States, as part of the public policy of the United States, leaders of labor unions have been, and now are, urged and requested to keep in- [fols. 163-165] formed the Department of Labor, and to seek its aid and assistance whenever the interests of labor may require such aid and assistance; that defendant signed said telegram in good faith and in accordance with his understanding of said collective bar*b*aining contract, and the provisions of the law above referred to, and the custom and practice above referred to; that said telegram was not signed or sent for the purpose of interfering with the said proceedings or interfering with the orderly administration of justice, or impeding or embarrassing said court or for any other unlawful or improper purpose.

* * * * * * *

[fol. 166] Wherefore, defendant prays that the order to show cause herein be discharged and dismissed and that the defendant be adjudged not guilty of contempt.

Ben Margolis, A. L. Wirin, Charles J. Katz, by ——
——, Attorneys for H. R. Bridges sometimes known as Harry R. Bridges.

[fol. 167] *Duly sworn to by Harry R. Bridges. Jurat omitted in printing.*

[fol. 168] EXHIBIT "G" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as Harry R. Bridges, in Contempt

DEMAND FOR JURY TRIAL

To the Honorable, the Above Entitled Superior Court:

The defendant in the above entitled proceedings in contempt, by his counsel of record hereby makes written demand for a trial by jury of the issues raised by the order to show cause and answer now on file herein.

Dated: This twenty-ninth day of August, 1938.

A. L. Wirin, Ben Margolis, Charles J. Katz, by Charles J. Katz, Counsel for the Defendant.

[fol. 169] EXHIBIT "H" TO PETITION

Tuesday, September 13, 1938.

The Court: There are two statements. Counsel requested that, before all these newspaper stories went in, I indicate what value I would place upon them. As I have indicated here today, I have read them, and I think I am accurate in this statement (I am quite sure that I am) that from the reading of those newspaper stories I have drawn one inference, and one inference only. I think that is all they are susceptible of. They certainly are hearsay as to the events, and I have not considered any of the events as being established by them as facts in the case. I have drawn one inference from them, and one inference only, and that is that Mr. Bridges, himself, the Walker case, the dispute in San Pedro out of which the Walker case arose and the conflict between the I. L. A. and I. L. W. U. were hot news. Now then, aside from anything to do with the Walker case at all, or with the subsequent decision by Judge Schmidt, but the relations of the I. L. A. and I. L. W. U. before the National Labor Relations Board, they were hot news and a story arose from that, and that is all in those exhibits.

This is merely a preliminary observation. I am not considering what the possible effect of Mr. Ashburn's argument would be concerning the inference that might have been drawn from the fact that the whole telegram is not [fol. 170] before us. I am not basing my decision at all upon that. When a trial judge comes to this point in the discharge of his duties sometimes he is undecided, but he cannot do as a jury does—disagree. Sometimes when the decision is over, he is not at all sure that he has been correct on questions of fact. There are matters in conflict. I have an idea that sometimes even where the trial judge feels that way, he does arrive at a correct conclusion, and it may be in cases such as this, where the picture seems clear that, nevertheless, he arrived at an incorrect conclusion due to the fact that in the use of human agencies in administering justice that probably is inevitable. The fact remains, that rightly or wrongly the facts in the whole picture seem rather clear to me.

This case grows out of—and many cases do—two circles of influence coming in conflict, one with the other. Now, we who are officers of the Court, have a high ideal with regard to our responsibility to the Court; not that we are serving ourselves, but we believe serving the public, I hope. Courts are a good deal like the fire stations. We hope we will never have to use them, and ordinarily you do not have to use them, but when you have a fire you hope the fire station is functioning efficiently and that there won't be any traffic out in front of the doors to keep the fire engines from coming out.

Mr. Bridges states that up to the time of the Walker case [fol. 171] the unions had no difficulty in courts. I do not know what his personal history is. I did not go into that, and it is not proper here. At least, he is in a case now, and he is interested in having the Court perform its functions without outside influence of any sort, and it is the duty of the officers of the Court to protect the Court in that position as far as they may. But now, in doing that we, who are officers of the Court, are responsible for the discharge of that duty and we must be careful not to assume too exalted a position. The work which we are doing must be guarded against interference, but that does not mean that when we are at that work all outside work has to stop. Street cars carrying the public going by may interfere with

us, but we do not stop their operation, and other business has to go on.

Notwithstanding the fact that there was a case pending in this Court, the Walker case, undetermined, the work for which Mr. Bridges was responsible had to go on. As a labor leader, he had his problems and he had his methods of discharging those problems and his interest was centered on those. I take it he would cease to be a labor leader if criticism such as his lieutenant made of his speech on January 28th, was a continuing criticism. He lost this usual efficiency and did not put over his message as he usually does. The tactics that he has to pursue to accomplish that which he is responsible for requires him to assume a position of [fol. 172] leadership, that the men in his organization may feel that he is not asleep on the job, that he actually is going to be energetic and that their interests are going to be protected in his hands.

Now, we have these two businesses going on and each has to give due regard to the other. By way of example, in the present case, assuming that Mr. Bridges had called the meeting of January 28th, the stop work meeting, not as a protest meeting, but for the purpose which was given by the various witnesses here—and I think we may accept that as the real purpose of the meeting, because they were face to face with a serious situation down there and certainly, from their viewpoint, the only satisfactory way was to call a meeting of the men involved. Taking that at its face value, the very calling of that meeting when we had a case pending here, would tend to interfere, although the meeting, itself, was not public, but the fact of the meeting would be public and anyone who knew that would draw their inference as to its purpose and it would tend to embarrass the Court concerning a pending case. Then, I take it, if that should be called contempt of court, it would be of such minor significance that it ought not to be noticed, because the object of the meeting was a perfectly legitimate one and the only reasonable method of solving that problem. If that was the method employed and the interference with the Court and embarrassment of the Court was entirely in- [fol. 173] cidental, such as the noise that street cars make in going by it would have, therefore, to be overlooked.

But we come to the telegram and we have an illustration of that conflict of interest which is not as justified as the

meeting would be. First, with respect to Mr. Bridges' responsibility for the publicity given the telegram, it seems to me quite clear—and I am not speaking for his conscience, but as a reasonable man—it seems to me he must accept it as a fact with the setup they have there, that the sending of that telegram was no more his act than the publicity given to the telegram was his act. He dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not, an express command respecting publicity, you are going to have the publicity, because of the telegram, itself. In dictating that telegram to his secretary he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it, because it was an established custom. When the copy of that telegram was put in the hands of a man who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it directly to the newspapers. Certainly that will be my viewpoint, and I see no break in the causation there.

Now, the telegram, while we do not have the whole of it, [fol. 174] I think that it is obvious that the reason that what we do have was published was that that was the colorful part of it. There is no drawing of punches in that telegram. Mr. Bridges cannot be criticized for that. Unfortunately, the wording of that telegram made it the sort of a telegram from which portions would be chosen for publication by the newspapers, and any part of it which was innocuous, was not published. The testimony is that Mr. Bridges read the whole telegram to the reporters and they chose what would make a story. It was inevitable that the portions of that telegram which were published would be published, if it were sent out and the ordinary course of affairs were carried through without interruption. Now, as inevitably—and there can be no argument, it seems to me, against this conclusion—that telegram, published due to its nature and due to its contents which were published, would inevitably interfere with the orderly administration of justice; not that it would cause the judge to change his mind, but it did embarrass and disturb the administration of justice and is as typical a case, it seems to me of a contempt, as several others might be, such as the Chronical case, and others. I am using the word "inevitable" in the sense of something that follows as a matter of reason—not inevitable in that

it is impossible not to be otherwise,—but inevitable in that it is dead sure to occur, as the sending of the telegram under [fol. 175] the office set-up of Mr. Bridges and resulting in its publication in Southern California papers where this was a live issue.

Now, I have reached the conclusion, not only because I concede the rule to be that Mr. Bridges is entitled to the presumption of innocence, that unless a matter is proven beyond a reasonable doubt I must conclude that it is not so, but because it seems to me to be a reasonable inference to be drawn from all the circumstances of his sending of the telegram, that there was no specific intent on his part to use this telegram as a subterfuge to get his message over to the judge. I do not think it was sent with the specific intent of influencing Judge Schmidt in his decision. It seems to me that if I am correct in what I believe to be—if not a deliberate intent and purpose on the part of Mr. Bridges arising as a result of counseling with himself in trying to dictate the telegram, nevertheless, as a very inevitable result of his habits of doing business and of facing the problem, as he has to, of keeping the employers aware of the fact that they have employees looking after their own interests and keeping the employees, themselves, aware of the fact that they have a leader looking after their interests, and keeping the public generally aware of the fact that the I. L. W. U. is not going to take it lying down—it seems to be I am making a better case for Mr. Bridges by assuming two purposes for sending this telegram in addition [fol. 176] to the one which I concede to be a purpose, that is, of informing the Administration at Washington that there was a crisis pending down here. It was his purpose and it is a part of—it seems to me—clearly a part of his approach to his problem, which is an ever present one, and a part of the reason for the particular wording that went into this telegram, to let the employers and employees know that the matter was being energetically watched. If I did not feel that, I would think more seriously of the interference with the Court. Were the only purpose that which has been expressed to us here, and that was informing Mrs. Perkins of the things which she already knew—I think these other purposes, in other words, go to mitigate that which I feel to be an interference—inevitable interference with the conduct of the proceedings which were still pending.

Now then, it follows from that, that I am of the opinion

that charges of contempt have been made out, and in measuring the culpability, as viewed between these two conflicting forces, if I did not believe that Mr. Bridges had no intent in sending this telegram to influence the judge,—rather, put it this way; if I believed the evidence here proved the whole case as set forth in the affidavit, I would consider the punishment permitted under the Code to be inadequate. But, as I say, I do not consider that to be so, but it is a case of finding the place where the balance stops between justification for [fol. 177] sending a telegram worded as this was, and the harm done to the administration of justice.

So that the order which will be entered, or the formal order to be drawn up should be, and will be that a contempt has been established and that, as punishment for the contempt, a fine of $125.00 be paid, and I will make a better rate on that than is usually given. In case it is not paid it will be at the rate of one day for each $25.00 not paid.

[fol. 178] EXHIBIT "I" TO PETITION

IN SUPERIOR COURT, COUNTY OF LOS ANGELES, CALIFORNIA

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, in Contempt

JUDGMENT

The following facts appear: That by order made on the 24th day of May, 1938, Harry R. Bridges, defendant above named, was ordered to be and appear before the above entitled court, Department I thereof, at a time and place in said order set forth, then and there to show cause, if any there be, why he should not be adjudged guilty of contempt of court and punished therefor by reason of the acts and each of the acts set forth in certain affidavits filed in said court, which affidavits were sworn and subscribed to by J. Louis Elkins, Executive Secretary of the Los Angeles Bar Association, L. E. Lampton, County Clerk, and Charles E. Sharritt and A. G. Stanham; and that thereafter said cause was ordered transferred to Department 22 of said court for further proceedings;

That on the 15th day of July, there came on for hearing in said Department 22, the motion to quash said order and the demurrers both general and special interposed on behalf of the defendant, Messrs. Charles J. Katz, Ben Margolis, and A. L. Wirin, appearing as counsel for said defendant [fol. 179] Harry R. Bridges, and Messrs. Allen W. Ashburn, Michael G. Luddy and Arnold Praeger, attorneys from the Los Angeles Bar Association, appearing as friends and officers of the court to assist the court on the hearing of said motion and demurrers;

That thereafter, to wit, on the 16th day of August, 1938, the following order was made: "(1) The demurrers are overruled, the motion to quash and recall the order to show cause is denied; (2) Messrs. Allen W. Ashburn, Arnold Praeger and Michael G. Luddy, members of the State Bar of California, are appointed and authorized to prosecute, on behalf of this court, the contempt proceedings now pending against the defendant, Harry R. Bridges, in so far as the same relate to the matters identified by reference to counts II and III in the affidavit of J. Louis Elkins; (3) The defendant Harry R. Bridges may have to and including the twenty-ninth day of August, 1938, in which to make answer to the affidavits referred to in the order to show cause heretofore served upon him and to serve a copy of his answer upon counsel above named and file said answer with this court. (4) The said contempt proceedings, in so far as the same relate to the matters identified by reference to counts II and III in the affidavit of J. Louis Elkins, are set down for hearing on the 6th day of September, 1938, at the hour of 10 o'clock a. m., in Department 22 of this court."

[fol. 180] That thereafter, to wit, on the 29th day of August, 1938, the answer of said Harry R. Bridges to the allegations contained in said affidavit was filed;

That thereafter, on the 6th, 7th, 12th and 13th days of September, 1938, the issues raised by said affidavits and the answer of Harry R. Bridges thereto, came on for hearing in said Department 22, the defendant Harry R. Bridges appearing in person and by his counsel, Messrs. Charles J. Katz and A. L. Wirin, and Messrs. Allen W. Ashburn, Michael G. Luddy and Arnold Praeger appearing on behalf of the court, to prosecute this proceeding pursuant to said order;

That the court proceeded to investigate the charges contained in Counts II and III of the affidavit subscribed and sworn to by J. Louis Elkins, and in the other affidavits above referred to;

That evidence, both oral and written, was received and the cause was submitted to the court for decision, and the court being fully advised in the premises finds as follows:

I

That the defendant did not do and perform the acts set forth in Count III in the affidavit of J. Louis Elkins, and as to Count III the defendant is not guilty of contempt of court.

[fol. 181] II

That on or about the 18th day of September, 1937, an action was commenced in the above entitled court by the filing of a complaint and the issuance of a summons entitled "P. W. Walker, et al., plaintiffs, vs. International Longshoremen's Association—Local 38-82, Inc., a corporation, et al., defendants," which said action is known as action number 420356 in said court.

That said action was tried in the above entitled court before the Honorable Ruben S. Schmidt, as Judge thereof, and on the 21st day of January, 1938, the said Ruben S. Schmidt, as Judge of said court, made, signed and filed his Findings of Fact and Conclusions of Law in said action.

That thereafter, but on the same day, a judgment and permanent injunction in said action were made and filed, in and by the terms of which a receiver was appointed over said International Longshoremen's Association, Local 38-82, Inc., and said receiver on said date qualified by filing a bond required by said judgment to be filed by him, and by making and filing his oath as such receiver.

That on the next day, to wit, the 22nd day of January, an order was made and entered by the court, staying the execution of said judgment and said injunction to the 29th day of January, 1938, which said order was filed on January 24, 1938; that said judgment and permanent injunction were entered by the clerk of this court, on the 24th day of Jan-[fol. 182] uary, 1938, in the judgment book kept by him for that purpose, and that on said date all the defendants in said action, against whom judgment had been rendered and

said permanent injunction issued, made and served a notice of intention to move for a new trial and a notice of motion to vacate the judgment and decision in said action, which said notice of intention was filed on January 26, 1938.

That from the time of the filing of said action, to and including the time of the events hereinafter referred to, the existence of said action and of the controversy involved therein received wide and general publicity in the Pacific Coast states of the United States of America. That almost daily during said period news items respecting the controversy involved in said action, and respecting conditions in the maritime industry on the Pacific Coast as a result of said controversy, appeared in the daily newspapers published and circulated in the City of Los Angeles and other cities in the County of Los Angeles, and that the existence of said controversy and of the fact that the said controversy was pending in the courts for determination was a matter of great public interest and general public discussion.

That on the 24th day of January, 1938, the defendant Harry R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States, at Washington, D. C., which [fol. 183] telegram contained words and figures as follows, to wit: This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending; Attempted enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board." That the words "this decision" and the words "Schmidt decision," as used in the telegram, referred to the judgment and permanent injunction in which was contained an order appointing a receiver, as hereinabove noted. That the initials "I. L. A.," referred to in said telegram, referred to

International Longshoremen's Association, Local 38-82, Inc., hereinabove referred to.

That at or about the time of the sending of said telegram the defendant Harry R. Bridges caused a copy thereto to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and [fol. 184] would be, furnished to and published in newspapers on the Pacific Coast and elsewhere, and said James D. O'Neil did give said telegram to newspaper reporters, and on the 24th and 25th days of January, 1938, the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, in the state of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere.

That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending.

Wherefore, it is Adjudged and Decreed that, by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court, and that because thereof, defendant Harry R. Bridges is ordered to pay a fine of $125.00; that in default of the payment of said fine on [fol. 185] or before 5 p. m., on the 10th day of October, 1938, said defendant shall be imprisoned in the county jail in the proposition of one day's imprisonment for each $25.00 of said fine, until said fine be wholly satisfied, and that the defendant be discharged on payment of such portion of said fine which shall not have been satisfied by imprisonment at the rate above prescribed.

Dated this 30th day of September, 1938.

Edward T. Bishop, Judge.

[fol. 186] EXHIBIT "J" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

In the Matter of H. R. BRIDGES, Sometimes Known as HARRY R. BRIDGES, in Contempt

NOTICE OF MOTIONS: FIRST, TO DISMISS SECOND, TO VACATE JUDGMENT OF CONTEMPT THIRD, FOR NEW TRIAL

To the Above Entitled the Superior Court of the State of California, in and for the County of Los Angeles, and to Messrs. Allan W. Ashbarn, Arnold Praeger and Michael C. Luddy, Esqs.:

You and Each of You Will Please Take Notice that the defendant, H. R. Bridges, sometimes known as Harry R. Bridges, will, on Thursday, the 13th day of October, 1938, at the hour of 2:00 o'clock P. M., or as soon thereafter as counsel may be heard, move the above entitled court, sitting in Department 22 thereof, as follows:

First, for an order to dismiss contempt proceedings; or

Second, in the event said motion be not granted, then for an order to vacate judgment of contempt; or,

Third, in the event said motion be not granted, then for an order granting a new trial.

Said motions, and each of them, will be based upon the following grounds:

[fol. 187] I

That said judgment, and said punishment for contempt imposed pursuant to said judgment, are violative of the Constitution of the State of California in the following respects:

(A) That said judgment denies to the defendant freedom of speech and freedom of the press, in contravention of Article I, Section 9 of the Constitution of the State of California;

(B) That said judgment denies to the defendant liberty and property without due process of law, in contravention

of Article I, Section 13, of the Constitution of the State of California, in that:

(a) It deprives him of the right to participate in and conduct his lawful occupation of executive and officer of a labor union;

(b) It is based upon a trial which did not include all of the essentials of a fair hearing in that the within proceeding is a criminal proceeding which was prosecuted by private parties, and not by the District Attorney of the County [fol. 188] of Los Angeles, nor by the Attorney General of the State of California, as by law provided;

(c) The defendant was denied the right to a trial by jury.

II

That said judgment, and said punishment for contempt imposed pursuant to said judgment, are violative of the Constitution of the United States of America, in the following respects:

(A) The following orders of the court deny to the defendant due process of law under the Fourteenth Amendment to the Constitution of the United States:

(a) The order of the court denying defendant's motion to quash the order to show cause in re contempt;

(b) The order of the court denying defendant's motion to dismiss proceedings on the ground that the proceeding herein is a criminal case and was not prosecuted by the District Attorney of the County of Los Angeles, State of California, nor by the Attorney General of the State of Cali- [fol. 189] fornia, but by private parties;

(c) The order of the court denying defendant's motion to dismiss the proceedings on the ground that all of the material allegations in the moving papers herein are based upon information and belief;

(d) The order of the court rejecting defendant's demand for trial by jury.

(B) The judgment of the court deprives the defendant of liberty and property without due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, in that:

(a) It denies to the defendant freedom of speech and freedom of the press;

(b) It is a conviction based upon a complaint (moving papers) and evidence which do not contain any reasonably ascertainable standard of guilt and upon a complaint and evidence which do not allege or disclose facts indicating the existence of a clear and present danger to the government of the United States or to the State of California, as pre- [fol. 190] scribed by the decisions of the Supreme Court of the United States of America;

(c) It denies to the defendant the right to carry on and conduct his lawful occupation, to wit, the business of acting as executive of a labor union;

(d) It denies to the defendant the right to petition the government for a redress of grievances.

III

The court lost and/or exceeded its jurisdiction over the defendant and over the proceedings herein in the following respects and particulars:

(a) In denying defendant's objection to the introduction of testimony and defendant's motion to dismiss the proceedings upon the filing of a verified answer by the defendant denying, under oath, all of the material allegations in the moving papers herein, and alleging, upon oath, that the acts complained of in the moving papers were all performed by [fol. 191] the defendant in good faith, and without any intent to hinder, delay or obstruct justice, or interfere with the orderly administration of justice or influence the said court;

(b) In denying defendant's motion to dismiss the proceedings on the ground that all of the material allegations in the moving papers are made on information and belief;

(c) In denying defendant's demand for a trial by jury;

(d) In denying defendant's motion to dismiss the proceedings upon the conclusion of the prosecution's case;

(e) In adjudging the defendant guilty of contempt;

IV

That a new trial should be granted herein upon the following grounds:

(a) Insufficiency of the evidence to justify the judgment;

(b) That said judgment is against the law;

(c) Error in law occurring at the trial, excepted to by [fols. 192-219] the defendant.

These motions will be based upon the records, files and pleadings in the above entitled proceedings, and upon such affidavits as may be filed, within the time provided by law, prior to the hearing hereof.

Dated October 7th, 1938.

Gladstein, Grossman and Margolis; Charles J. Katz; A. L. Wirin. By Charles J. Katz, Attorneys for Defendant.

* * * * * * *

[fol. 1] EXHIBIT "M" TO PETITION

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 420356

Department 22. Hon. Edward T. Bishop, Judge

P. W. WALKER, et al., Plaintiffs,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 38-82 INC., et al., Defendants

Reporter's Transcript

In Re: Contempt

APPEARANCES:

For Plaintiffs: Arnold Praeger, Esq., Allen Ashburn, Esq., and Michael E. Luddy, Esq.

For Defendants: A. L. Wirin, Esq. and Chas. J. Katz, Esq.

[fol. 2] September 6, 1938; 10 o'clock A. M.

BRIAN BELL, called as a witness by the People, being first duly sworn, testified as follows:

The Clerk: State your full name, please.
A. Brian Bell.

Direct examination.

By Mr. Luddy:

Q. Mr. Bell, what is your profession or occupation?

Mr. Katz: To which we object, upon the ground that it is incompetent, irrelevant and immaterial, and our objection is to any evidence being introduced in this case, and I wonder if I may be heard briefly on that point.

(Prolonged argument.)

The Court: Objection overruled.

By Mr. Luddy:

Q. I think we asked you what your profession was?
A. I am the news editor of the Western Division of the Associated Press.
Q. How many years have you been connected with the Associated Press?
A. 15 years.
Q. At the present time, where do you make your headquarters?
[fol. 3] A. San Francisco and Los Angeles. I spend a portion of the time each month in Los Angeles, and the remainder in San Francisco.
Q. Do you have headquarters or bureaus, or some other names for that portion of the Associated Press in San Francisco, and that portion in Los Angeles?
A. We have bureaus.
Q. You are the executive in charge of the Los Angeles Bureau and also the executive in charge of the San Francisco Bureau. Is that right?
A. Yes, sir.
Q. And you were in charge of both of those bureaus in January of this year, were you?
A. Yes.

Q. So far as the operation of the Associated Press and the ordinary routine running of the bureaus at Los Angeles and in San Francisco, they are the same now as they were in January of this year?

A. Yes, sir.

Q. So, if perchance I should ask you questions that seem to relate to the present time, you will understand I am including the events as of January of this year, will you?

A. Yes, sir.

Q. And the Associated Press is a news gathering organization, is it not, and the various newspapers which have its service *as* known as members? Is that correct?

[fol. 4] A. Yes, sir; it is co-operative.

Q. And during January of this year did the Associated Press have members here in the City of Los Angeles?

A. Yes, sir.

Q. What papers were members of the Associated Press at that time here?

A. The Los Angeles Times, Los Angeles Examiner, The Los Angeles Herald and Express, Hollywood Citizen News, within the City of Los Angeles.

Q. And what papers in San Francisco were members of the Associated Press in January of this year?

A. The San Francisco Chronicle, San Francisco Examiner, San Francisco Call Bulletin.

Q. Under the contractural relationship that exists between the Associated Press and its members, does the Associated Press have the right to use any material which may appear in member papers?

A. Yes.

Mr. Katz: I move to strike out the answer for the purpose of entering an objection, and I object to it upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Luddy:

Q. Your answer was that it does have?

A. It does.

Q. Coming now to San Francisco, in the event that a member paper carrys a news item, is there any facility [fol. 5] which the Associated Press has for getting that news item, other than just picking it up out of the paper after the paper is printed?

Mr. Katz: That is objected to upon the ground it is immaterial, argumentative, and calls for a conclusion of the witness and is not binding upon the defendant, and is not within the issues of this case.

The Court: Overruled.

A. We received copies of stories written by our members in advance of publication.

By Mr. Luddy:

Q. The Chronicle in San Francisco is a morning or evening paper?

A. It is a morning paper.

Q. Is there an evening paper in San Francisco known as the News?

A. There is.

Q. In what manner do you receive at your bureau in San Francisco the Associated Press, new items which may be written for publication in the morning issue of the San Francisco Chronicle?

A. We receive copies of the story shortly after they are written.

Q. Would you explain that to the Court perhaps just a little more in detail? Assuming that a reporter writes a story in the city room of the Chronicle during the course of the evening for publication in the Chronicle in the morn- [fol. 6] ing; in what fashion would that news item come to the attention of your bureau in San Francisco?

A. A carbon copy would be placed on a hook and removed from that hook and delivered to our bureau on the second floor of the Chronicle Building.

Q. Your news bureau is in the same building that the San Francisco Chronicle is?

A. Yes, sir.

Q. And is there a hook in the city room, or some other room of the Chronicle upon which carbon copies of stories written by the reporters of the Chronicle are place- for the use of the Associated Press?

A. There should be.

Mr. Katz: I move to strike out the answer.

The Court: It may go out.

By Mr. Luddy:

Q. Is there such a hook?

A. Well, I have never seen the hook, so I can't say there is such a hook.

Mr. Luddy: I may state to the Court that it is a little out of order, but I am going to ask the witness to assume that there is a hook.

By Mr. Luddy:

Q. Assuming there is a hook, are you able to tell us how shortly after the carbon copy is placed on the hook, it would, in the ordinary routine, come into the bureau of the Associated Press?

Mr. Katz: Just a moment. I object to the question upon [fol. 7] the ground that it is assuming a fact not in evidence, and is incompetent, irrelevant and immaterial.

The Court: That is sometimes inevitable where you have a witness out of order. Overruled.

A. Through the alertness of a group of office boys this copy would be collected and sent to our office at intervals; it might be within the next minute, or it might be within several minutes. I would not say accurately how long it would take for the story to reach our bureau.

Q. Mr. Bell, are you familiar with the story that went out on the Associated Press Wire from San Francisco in January of this year which related to a telegram sent from Mr. Harry R. Bridges to Madam Perkins, the Secretary of Labor?

A. I saw the story.

Q. Do you know from what source the Associated Press acquired that story?

A. The San Francisco Chronicle.

Q. Do you know what time in the evening of the 24th of January, if that was the date upon which you acquired that story from the Chronicle?

A. I assume on the wire, in the early evening about 7:30, I would say, or before 8 o'clock, as I recall it.

Q. Do you know whether or not the story originated—that is, the story which the San Francisco Associated Press placed upon the wire originated in an article which Mr. Larry Resner had written for the Chronicle?

[fol. 8] A. I do not.

Q. When the story was placed upon the wire by the Associated Press, did it come to the members in Los Angeles?

A. To all of the members on the wire being served, yes.

Mr. Luddy: I think possibly it will appear in a large number of cases, or later be presented to the Court that there appears to be a symbol out of San Francisco on the wire consisting of the letters AP which are joined together and attached to those as a signature.

A. That means, "Associated Press".

By Mr. Luddy:

Q. In other words, where the letters AP appear on the date line, that means a story transmitted to the members of the Associated Press?

A. Unless there has been a typographical error, yes.

Mr. Luddy: That is all on direct, gentlemen.

Mr. Katz: No questions.

Mr. Luddy: All right, Mr. Bell. May it please the Court, this matter perhaps should have been taken up. Will you wait just a moment, Mr. Bell?

The Court: All right.

Mr. Luddy: May it please the Court, this is a matter that possibly should have been taken up at the opening of the hearing this morning, as to the situation that the Committee of the Bar Association finds itself in with respect to certain witnesses brought here from San Francisco, which is as follows: We have under subpoena pursuant to an order [fol. 9] which was issued by another judge of the Superior Court in your Honor's absence, which subpoena directed the presence here of Mr. Bell of the Associated Press, Mr. Resner, Mr. Eggleston and Mr. O'Neil. Those subpoenaes were issued and an order based thereon upon the application by affidavit of Mr. Praeger as one of the attorneys before this Court, setting forth the material witnesses. We desire to ask the Court that pursuant to Section 1329 of the Penal Code, an order be made fixing fees which are to be paid these four gentlemen for coming down here covering as near as the Court may estimate what the reasonable and necessary expenses were on the trip, and I believe the code provides $3.00 a day, in Code Section 1329. I believe your Honor has the code.

The Court: I have it here. It is not an order to be made where the witness is present, is it?

Mr. Luddy: No, it is not. If your Honor please, I just wanted, if possible, to have the order made and if the Court

wants to inquire from the witnesses as to what their expenses were, your Honor may do so. The affidavit should appear in support of the order.

Mr. Wirin: I may say that it is a matter over which we have no control and to which we have no objection, and if the Court feels that it is a proper charge against the County, it is all right with us.

The Court: I would much prefer to handle this in this fashion: Gentlemen, I am willing to make the order, because [fol. 10] it is a matter that may be gone into by the trial judge and I am willing to make the order, but I would like to have it in each case supported by some showing of reasonable expenses, and the matter can be handled without interrupting proceedings in the course of the trial.

Mr. Luddy: All right. I take it there is no reason why Mr. Bell cannot be excused from further attendance. Thank you, Mr. Bell. Mr. Bell, will you wait just a moment.

The Court: I do not know why we should make any exception to those coming in after the order has been made. The gentleman standing by the water cooler. I am sorry we haven't seats, but we will have to have the court room cleared of those who have not seats, the gentleman standing next to the railing was here when the order was made.

Mr. Luddy: Mr. Resner, please.

[fol. 11] Lawrence Resner, called as a witness by the People, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

A. Lawrence Resner.

The Clerk: How do you spell the last name?

A. R-e-s-n-e-r, Resner.

Direct examination.

By Mr. Luddy:

Q. Mr. Resner, what is your business?

A. I am a newspaper reporter for the San Francisco Chronicle.

Q. And were you engaged as a reporter on the Chronicle in January of this year?

A. Yes, sir.

Q. Were you handling any particular line of news at that time?

A. No, I am on general assignments.

Q. Your immediate superior being the City Editor of the Chronicle?

A. Yes, sir.

Q. And by being on general assignments, you mean that the City Editor assigns certain news stories to you to develop and to write?

A. That is correct.

[fol. 12] Q. Do you recall the preparation and writing of a story for the Chronicle which related to a telegram which Mr. Bridges was alleged to have sent to Madam Perkins, the Secretary of Labor, in January of this year?

A. I have, since it was brought to my attention by Mr. Chapman, who called on me.

Q. Did you write a story on that general subject matter?

A. I did write the story.

Q. Do you remember in what issue of your paper the story appeared?

A. I think it was in January.

Q. Would you say it was in the issue of January 25th?

A. May I see it?

Q. Yes. I show you this, with Mr. Katz's consent, and you may refresh your recollection as to the date on which the story appeared.

(Exhibiting newspaper to witness.)

A. I wrote that story.

Q. I didn't ask you about the particular story, but you did write a story on that subject, and the story did appear in the morning edition of the Chronicle on the 25th of January of this year. Is that correct?

A. That is right.

Q. Before you wrote that story, while you were preparing to write it, was your attention directed to any item which appeared in the afternoon edition of the news which ap-

[fol. 13] peared in San Francisco on the afternoon of January 24th?

A. Well, I think that it was first brought to the City Desk's attention when it appeared in the News, and they then told me, or instructed me to find out what it was about.

Q. Did you receive some instructions from your City Editor in regard to checking on a story that had appeared in the News the afternoon before?

A. Well, on the same afternoon it appeared in the News I was told to check on the story.

Q. Now, in connection with the obtaining of information upon which you say the story you wrote is based, with whom did you consult?

A. Do you mean to find out or to develop the story?

Q. That is right.

A. I called up Mr. O'Neil—Jim O'Neil.

Q. Mr. Jim O'Neil is, or was at that time the publicity agent of the C. I. O., was he not?

A. Yes, he handled their publicity.

Q. And is Jim O'Neil the one that has been referred to as James D. O'Neil?

A. I think that is his full name. I am sure.

Q. Were you acquainted with Mr. O'Neil prior to the time you wrote this particular story?

A. Yes, sir.

Q. Had you been in contact with him before in connection [fol. 14] with the obtaining of material in connection with writing stories with relation to labor matters in San Francisco?

A. Frequently.

Q. Frequently, you say?

A. Yes, sir.

Q. Over how long a period of time prior to January 25, 1938, had you been frequently in contact with Mr. O'Neil?

A. Well, I think during the time, however long it was before that particular date, that the regional office of the C. I. O. had been established. That is the period I remember. I don't know exactly how long it was.

Q. Would you say that was a period of a good many months?

A. Well, it was months—I don't know how many months.

Q. And it is a fact that in trying to secure any information, or desiring to secure any information from the C. I. O. or Mr. Bridges in relation to the C. I. O., you consulted Mr. O'Neil?

Mr. Katz: I am going to object to the question upon the ground that it is compound, leading and suggestive and is calling for a conclusion of the witness.

The Court: Objection overruled. Will you answer it?

A. Repeat it.

(Last question read.)

A. Yes.

By Mr. Luddy:

Q. And you had been doing that for several months, had you, prior to January 25, 1938?

[fol. 15] A. Whenever it was necessary to get information about the C. I. O.

Q. You recognized Mr. O'Neil as being the publicity agent and the one from whom you might procure all information concerning Mr. Bridges on the C. I. O., did you?

A. Yes, sir.

Mr. Katz: That is objected to upon the ground it is incompetent, irrelevant and immaterial, and calling for a conclusion of the witness and it is not binding upon the defendant.

The Court: If it isn't binding upon the defendant Bridges when the matter is all in, it may be stricken out.

Mr. Katz: I might say that I anticipate that the Court is going to rule that it is material, but for the purpose of protecting the record—I only do it for my record.

The Court: I recognize the necessity of protecting the record where there is a technicality. Objection overruled.

A. Well, I think you asked me if I got all of this information from O'Neil.

Mr. Katz: What is the answer?

The Court: You had better read the question.

(Last question read.)

A. I don't think that is the question. Wasn't there a question after that?

Mr. Katz: It was in regard to your securing information from Mr. O'Neil, as being the publicity man for the C. I. O.

[fol. 16] Mr. Luddy: I took it for granted when I said "Concerning Mr. Bridges and the C. I. O.," it related to his relation as a labor leader of the C. I. O.?

A. Yes.

The Court: Do we have you sufficiently confused now?

A. I don't think he has read back that question you wanted me to answer.

By Mr. Luddy:

Q. During the month of January, 1938, and for several months prior thereto, whenever you, as a newspaper man, desired to acquire information concerning the C. I. O. or Mr. Bridges' activities in connection with the C. I. O., whom would you contact?

A. Well, I admit Mr. O'Neil was the publicity director and the most convenient source and we frequently contacted him, but also we contacted other officials of the Longshoremen or C. I. O., and occasionally we got information from them, too.

Q. I think you referred to the fact that there was a news item appeared in the San Francisco News on January 24, 1938. I show you what appears to be a copy of the News of Monday, January 24, 1938, which has been shown counsel for Respondent and call your attention to the fact that on the bottom right hand corner of the front page appears to be about a quarter of a column item marked with blue pencil, and ask you if that is the news item to which your attention was directed by your City Editor?

[fol. 17] A. Yes, that is the item.

Mr. Luddy: I don't particularly care about offering the entire paper, but we should like to have that item which is down in the corner and which counsel has already seen, go into evidence. Mr. Katz, you will stipulate without my bringing someone from San Francisco, that that is a copy of the San Francisco News?

Mr. Katz: Yes, but we do not want to stipulate to that articles, because it doesn't appear what the telegram is, and it is some party's commentary about another one's statement.

Mr. Luddy: I want to show the mechanics, as to how this man worked, and how the story ultimately came to the papers here in Los Angeles.

The Court: You are offering that particular story.

Mr. Luddy: Yes, the portion only identified by the witness. I see no reason why it might not be torn right out of the paper. We have no objection to it, and it will only clutter up the record with all the papers here.

The Court: For the convenience of identifying these various exhibits those offered by counsel appointed by the Court will be made People's Exhibits, and this will be People's Exhibit No. 1.

By Mr. Luddy:

Q. Now, after your attention was called to the article concerning which you have just been testifying, you communicated with Mr. O'Neil, I think you have already testified. Is [fol. 18] that a fact?

A. Yes, sir.

Q. In what manner?

A. By telephone.

Q. Can you recall what conversation was had with Mr. O'Neil over the 'phone?

A. I asked him referring to this article in the News, if the telegram on that subject had been sent Mrs. Perkins, and he said it had, and I asked him if we could have a copy of it and he said we could, and he read it to me and I took it in the office on the typewriter and then——

Q. (Interrupting) In other words, he read what he told you was a verbatim copy of the telegram which had been sent by Mr. Bridges to Madam Perkins?

A. That is right.

Q. And you asked him if you might have a copy of it?

A. Yes, sir.

Q. Did you tell him who you were?

A. Yes.

Q. That is, he knew he was talking with Mr. Resner of the Chronicle, did he?

A. I am quite sure he did, yes sir.

Q. You took a copy of it as he dictated it over the telephone seated at your typewriter. Is that right?

A. Yes, sir.

Q. Now, there appears in Tuesday, January 25th, night [fol. 19] edition of the Chronicle a story entitled, "Bridges says court action means tie-up." Did you write that story?

A. I wrote the story, but not the headlines.

Mr. Luddy: This has already been shown to counsel and we desire to offer pages 1 and the continuation of the story on page 9 of the issue of the San Francisco Chronicle of January 25, 1938.

The Court: Are you offering that now?

Mr. Luddy: We are.

Mr. Katz: I object to it upon the ground it is incompetent, irrelevant and immaterial and is not binding upon the defendant in this action, was not dictated by the defendant or dictated under his direction and the only matter set forth

was that the telegram was read, and the only thing in issue, it seems to me, is that telegram.

The Court: Admitted as People's Exhibit 2.

By Mr. Luddy:

Q. Mr. Resner, are you familiar with the arrangements in the Chronicle office with respect to matters which are written by reporters of the Chronicle being sent to the Associated Press Bureau in San Francisco?

A. Well, our stories are written on what we call butts, which includes the original and three carbon copies, and we have spikes in the office on which we put duplicates of these stories, and one of those, I think, goes to the Associated Press.

Q. In other words, as you wrote the particular story which [fol. 20] has appeared in the issue of the Chronicle which has been just introduced in evidence, a duplicate copy was made by you and one duplicate copy placed on a hook for the benefit of the San Francisco Associated Press. Is that right?

A. Well, that is right. I only assume that is how it was handled.

Mr. Luddy: May it pelase the Court, we start out upon the theory that evidence which will be introdnced on the separate counts will be limited to those counts, and we find with respect to Mr. Resner and I think also with respect to two other witnesses that are here from San Francisco, we wish to elicit from them evidence which relates to both of the remaining counts, and with the permission of the Court and counsel we would like to interrogate them and others, even though it may relate to the second count or the third count.

The Court: Proceed.

Mr. Luddy: Counsel, I will show you these copies of the Chronicle for the 28th, 29th and 30th of January of this year. These are stories under the by-line of Larry Resner.

The Court: While counsel are reading the daily paper, we will take a short recess, largely for the purpose of having the windows thrown open so that we can get some fresh air. Take a very short recess.

(Recess.)

The Court: Are you ready to proceed? Is my understand- [fol. 21] ing correct, gentlemen, that what you are introducing here is not the whole sheet, but just that part?

Mr. Luddy: Yes.

The Court: All right.

By Mr. Luddy:

Q. Mr. Resner, coming back now briefly to the story which you wrote, and which appeared in the issue of the Chronicle on January 25, 1938, after you had received from Mr. O'Neill what purported to be a copy of the telegram; that is, after the copy had been dictated to you over the 'phone, did you have some conversation with Mr. Harry Bridges with respect to that telegram?

A. Well, after I had received the telegram the office wanted further information on the story and I then proceeded to call up Mr. Bridges.

Q. Do you remember what conversation you had with Mr. Bridges?

A. Well, I think in brief the conversation is in this article here.

Q. Do you recall whether or not—strike that out. Did you have any conversation with Mr. Bridges in which you mentioned the fact that you had received a copy of the telegram from Mr. O'Neil?

A. Well, I don't recall that I told him that I had received the telegram. I guess—I mean, we talked just generally of the fact that this telegram seemed to have been sent to Madam Perkins. That is the general situation referring [fol. 22] to the Los Angeles situation and that is what our conversation was about and he had his conversation with me about the situation down in Los Angeles.

Q. About the telegram that had been sent to Madam Perkins?

A. Not particularly about the telegram, but about the Los Angeles situation.

Q. Well, in your conversation with him—just a minute. Do you suppose if you were to briefly, as you may, just run through that article which you wrote and see whether or not it can be used to refresh your recollection so as to give us any more details as to any conversation you had with Mr. Bridges?

(Witness reads document.)

A. Why, I think the conversation that is in there, is more or less the substance of our conversation. I called him up after I had received a copy of the telegram from O'Neil. I don't think there is anything I can remember beyond that.

Q. Did you tell Mr. Bridges you did have a copy of the telegram from Mr. O'Neil?

A. I don't recall that I told him specifically that, but I think it was understood between us what we were talking about.

Q. Was there a reference in your conversation with him, or by you, or in your conversation to the telegram?

[fol. 23] A. I mean, as I say, I can't specifically remember that we did talk about the telegram. I mean, we had the telegram—I mean, there was no point in asking him about that, so what I asked him about was the legal action down in Los Angeles, which we didn't know anything about, and I think that is what we talked about and although he talked—might have referred to the telegram, that is not what we were talking about—what I wanted to find out was not that he sent the telegram, because I had it. O'Neil had told me they had sent it and we wanted to find out what the telegram meant.

Q. You called Mr. Bridges to ask what the telegram meant?

A. Yes.

Q. And did you ask him what the telegram meant?

A. Well, I didn't ask him—do you mean specifically, did I ask this specifically what the telegram was?

Q. No, not in those exact words, but did you in effect ask Mr. Bridges what the telegram meant?

Mr. Katz: I object to that upon the ground that it is calling for a conclusion of the witness, and is already asked and answered three or four times.

The Court: You may answer.

A. Repeat the question.

(Last question read.)

A. Well, as I say, Mr. Praeger——

The Court: Mr. Luddy.

[fol. 24] A. Pardon me. Mr. Luddy, I mean, as I recall our conversation, I didn't say, "What does this telegram mean?" because I had it and I mean, I am not entirely un-

familiar with those situations. I mean, that is, with longshoremen, but I mean he had sent the telegram to Mrs. Perkins and what I wanted to find out was this situation down in Los Angeles. I mean, Judge Schmidt had established a receivership over the San Pedro Local of the longshoremen, and that is what we talked about. I mean, as I recall the conversation, I don't recall specifically that we used the words—I mean, about the telegram, because our conversation—I mean, the effect that the telegram had been sent was a foregone conclusion in my mind and what I wanted to find out was what this legal action was down here, and I seem to be quite convinced in my mind that that was the extent of our conversation.

Q. Now, was your conversation with Mr. Bridges such that it was taken for granted in your conversation with him that he knew you had this telegram, or had a copy of it?

Mr. Katz: That is objected to upon the ground that it is calling for a conclusion of the witness.

The Court: Sustained. The answer is already in to the same effect.

By Mr. Luddy:

Q. Now, as I understand it, the City Desk—after you told them about the copy of the telegram that Mr. O'Neil had given you over the 'phone, the City Desk told you they wanted to get something more, did they?

[fol. 25] A. No. That is correct. I mean—I think I handed the copy of the telegram I had taken—I don't know. It was the City Editor. It may have been Mr. Chandler, the managing editor, and he read it over and told me to find out a little bit more what this means, and I called up Mr. Bridges.

Q. Now, as I recall the News story, that hadn't carried what purported to be a verbatim copy of the telegram at all?

A. No.

Q. So that the first intimation that you had as to an exact copy of the telegram was from Mr. O'Neil?

A. Yes, when I got the copy.

Q. Now, when you got that, you went to Mr. Chandler, the City Editor, and called his attention to the telegram?

A. Well, they knew I was getting it and when I got it, they wanted to see it and I showed it to them.

Q. And they instructed you to try and get something more on it, did they?

A. Yes sir, that is correct.

Q. And then you called Mr. Bridges on the 'phone?

A. Yes, sir.

Q. Do you recall what your opening of the conversation was with him over the 'phone? Did you introduce yourself, or anything of that sort?

A. Yes, I told him this was, and I named my name, and I asked him what the situation was all about—I mean, this receivership down in Los Angeles.

[fol. 26] The Court: Can you gentlemen hear over there?

Mr. Katz: No, sir.

The Court: Talk a little louder.

A. As I recall it, I told him who I was and asked him what the situation was all about, referring to the receivership that had been established down here and then, of course, Mr. Bridges proceeded to explain to me. I mean, the substance, I think of what he told me is in that story that I wrote. I think it is pretty complete. I quoted him quite extensively there.

Q. Well, do you recall in your conversation with him that you made any reference to the telegram?

Mr. Katz: That is objected to upon the ground that it has already been asked and answered.

The Court: He may answer.

A. What you mean is, did we speak specifically about the telegram?

By Mr. Luddy:

Q. Let's back up just a little. Your instructions were to find out what that telegram meant, weren't they?

A. More or less what that telegram meant and what the situation was about. I mean, we assumed this telegram referred to this situation down in Los Angeles, and so that is what I wanted to find out about.

Q. Just as you got the telegram, and got it for the first time, your superiors knew you were getting it and you called [fol. 27] their attention to it and they instructed you to find out what it meant?

A. Yes, that is correct.

Q. Did you follow those instructions?

A. I found out what the trouble was in Los Angeles and wrote a story about it.

Q. Weren't your instructions to find out what the telegram meant?

Mr. Katz: I object to that upon the ground that it has already been asked and answered.

The Court: I think he has answered it. Awhile ago he said he was asked to find out, and he asked him and found out what the telegram was.

By Mr. Luddy:

Q. That is what your instructions were after you had gotten the telegram from Mr. O'Neil, were to find out what it meant?

A. My point simply is, that what they told me to find out about was the situation the telegram referred to, and that is what I did find out about.

Q. Did you ask Mr. Bridges what the telegram referred to?

A. I don't think I put the question that way, "What does this telegram mean?" I think I asked him what the situation was in Los Angeles. I think my questions were limited to that. I think he probably knew I had the telegram.

Q. Why did you assume that? That is what I want to get at. In your conversation you assumed Bridges knew [fol. 28] that you had the telegram, did you?

A. Yes, sir.

Q. What led you to assume that Mr. Bridges knew that you had the telegram? That is what I want to get at, Mr. Resner?

A. Well, I mean I supposed that anything coming from Mr. O'Neil at that time was authorized by Mr. Bridges' attorneys, so when I called him up, that was my assumption.

Q. And in the conversation——

Mr. Katz (Interrupting): Now, I move to strike out the answer as being a conclusion of the witness, and not binding upon the defendant.

The Court: Well, if it has any purpose, overruled. Motion denied.

Mr. Wirin: We assume the purpose is permitting him to state or show the knowledge of this witness.

The Court: Yes. I don't know just what Mr. Luddy is after, but I have a suspicion that he is trying to lay a foundation and the foundation he is trying to lay here is what the witness had in mind, so far as that goes.

By Mr. Laddy:

Q. I think you have already told us that in your conversation with Mr. Bridges you just assumed he knew you had the telegram. Is that right?

A. That is correct, yes sir.

Q. Now, in your conversation with him, did you make some reference indirectly or directly—or indirectly, to the [fol. 29] situation down in Los Angeles and the telegram he had sent to Madam Perkins?

A. Well, as I recall it, the extent of our conversation concerned the situation down in Los Angeles. I don't know that either one of us referred at that particular moment to the telegram because, as I say, I felt he knew that I had the telegram, or I assumed that he knew that I had it.

Q. Did you have a conversation with him later in which the matter was mentioned?

A. I mean, that is all the conversation I had that day.

Q. About the telegram?

A. About the story that appeared in the morning Chronicle.

Q. Did you have a conversation with Mr. Bridges after the story appeared, about the telegram, or in which the telegram was mentioned?

A. Do you mean, the following day?

Q. At any time after that?

A. Oh, I mean, I have had conversations with Mr. Bridges after those dates, yes.

Q. In which this telegram was discussed?

A. Well, as a matter of fact, I think the telegram was—well, I mean, that was something that happened on that day, and I think that is all our conversation concerned particularly, the situation in San Pedro. I mean, so far as—I mean, so far as I can remember—I mean, that wasn't—[fol. 30] that was the only day, so far as I can recall, that we were concerned with the telegram, because that was the basis for the story of that date and after that it was the situation that followed that telegram which was the things which were imporant to us. I mean, in whatever subject it was the telegram referred to and whatever might follow.

Q. What did Mr. Bridges tell you that night over the 'phone?

A. It is all in the story.

Q. That is to say that the matters which appear herein are a correct statement of what Mr. Bridges told you?

A. In substance they are correct, yes.

Q. We are referring now to People's Exhibit No. 2, which is your story of January 25, 1938?

A. That is right.

Q. The information upon which you based this story was received from Mr. Bridges, plus the fact that you received a copy of the telegram from Mr. O'Neil. Is that right?

Mr. Wirin: I object to that upon the ground that it has already been asked and answered, so many times, your Honor, and I object upon the ground that it is repetition.

A. Yes.

Mr. Wirin: I move to strike out the answer.

The Court: Yes, it may go out.

By Mr. Luddy:

Q. Any statements that appear in your story of January 27, 1938, which do not constitute quotations of the telegram [fol. 31] to Madam Perkins, were based upon information which Mr. Bridges gave you that night over the telephone?

A. May I see the story?

Q. Yes.

(Exhibiting document to witness.)

Q. Or other parts of the story, other than the quoted telegram?

A. Well, I think that wherever the story refers to Mr. Bridges, I think that——

Q. (Interrupting.) A little louder, because these gentlemen have to hear you.

A. I say, I think wherever I refer here to anything said by Mr. Bridges, I quote him. I don't think there is any paragraph where there is not a peg, or something.

Q. I call your attention to one paragraph which appears about three-quarters of the way down the column on the front page immediately following the sub-heading, "Mass Meeting. Bridges said he intended to leave here for San Pedro where members of the C. I. O. local intended to hold a mass protest meeting Wednesday or Thursday." Did Bridges tell you that over the 'phone that night when you were talking to him?

A. I think he told me that, yes sir.

Q. And the meeting was going to be a mass protest meeting and it was going to be held Wednesday or Thursday?

A. Yes, sir.

[fol. 32] Q. Now, I follow immediately after that which I have just read to you by reading further from the same article: "In further explanation of his telegram the longshoremen's president said, 'Judge Schmidt has actually ruled that the Port of Los Angeles will be tied up. This means the automatic tie-up of all other ports on the coast.' " And then you proceed to quote him further. You did receive that statement and you did mean that, I see, by placing it in quotes, received that information in your conversation with Mr. Bridges over the telephone before you wrote this story and before it appeared?

Mr. Wirin: I object to that upon the ground that it is leading and suggestive.

Mr. Luddy: I will withdraw the question.

By Mr. Luddy:

Q. I call your attention to that portion of your story which I have just read in which you proceed to place the quotation marks, preceded by the statement, "In further explanation of his telegram the longshoremen's president said," and so forth—reading that, is your recollection sufficiently refreshed so that you can tell us whatever appears in that article to be in quotations, is quoting Mr. Bridges on matters which Mr. Bridges stated to you over the 'phone that evening and which you placed in your story?

A. Yes, that refers to that conversation, and while those quotes are not letter perfect, I feel sure that is what Mr. [fol. 33] Bridges told me over the 'phone.

Q. Then everything that appears in the article which appears not to be quoting Mr. Bridges, although you say it is not letter perfect, is in effect what Mr. Bridges told you over the telephone while you were preparing the story?

A. Well, he told me on the evening I prepared the story, and this is the morning edition of the Chronicle.

Q. Now, when you state, "In further explanation of his telegram the longshoremen's president said," and then proceed to quote him, you understood when you received that statement from Mr. Bridges and he was giving that statement to you, it was in further explanation of the telegram sent to Madam Perkins, did you not?

Mr. Katz: I object to that upon the ground it is incompetent, irrelevant and immaterial. His understanding cannot bind the defendant.

Mr. Luddy: Pardon me?
The Court: Sustained.

Mr. Luddy:

Q. Now, will you please read that again. (Exhibiting document to the witness.) After reading that, can you now tell us whether or not it is a fact that you had a direct conversation with Mr. Bridges over the 'phone concerning that telegram to Mrs. Perkins?

A. You mean—well, as I say, I mean that those are my words there. I don't still recall—I mean, in our conversation we used the word "telegram" for instance. I might have [fol. 34] said there in further explanation of the Los Angeles situation. It is just a matter of putting a couple of words together, inasmuch as I had referred to the story here, it is probable and natural for me to explain it here, but I still can't remember in our conversation we were talking about this problem down in Los Angeles, and I can't remember the telegram.

Q. Do you know of any reason why a telegram to Madam Perkins would not have been referred to in your conversation with Mr. Bridges that night?

Mr. Wirin: I object to that on the ground that it has already been asked and answered.
The Court: He may answer.

A. Do you mean, why it shouldn't?
Q. Yes.
A. No. So far as I recall, there was no reason.

Mr. Katz: As a matter of fact the witness has said that he had the telegram and Mr. Bridges knew he had it and he didn't discuss it, so my objection should have been that it has already been asked and answered.
The Court: Surely.

By Mr. Luddy:

Q. Do you recall what Mr. Bridges did say to you that night concerning the situation in San Pedro or Los Angeles?

Mr. Wirin: My recollection of the matter is that that was [fol. 35] asked a while ago three or four times.
The Court: Sustained.

By Mr. Luddy:

Q. Do you recall attending a meeting which was held in the Bowl at Wilmington sometime in January of this year?

A. Yes, sir.

Q. Do you remember the date upon which that meeting was held?

A. It was sometime after the 25th—just the matter of possibly a week or a little less than that, I think.

Q. At any time had you been handling the writing of the stories which appeared in the Chronicle on the issue of Judge Schmidt's decision and the proposed meeting to be held at the Bowl in Wilmington? Had you been handling that matter for your paper?

A. I think that I probably did most of that, although I am not sure that I handled all of the story. I think some of the story following that came over the wire, either the Associated Press or United Press.

Q. Was there at this time a Mr. Eggleston connected with your paper?

A. That is correct.

Q. In what capacity?

A. Mr. Eggleston writes columns for the paper and he is recognized as our labor editor.

[fol. 36] Q. Does he have the title of labor editor?

A. I think that would be safe to say that that is his title.

Q. In other words, is he described in the by-line as a labor editor of the Chronicle?

A. They have. In the last several months Mr. Eggleston's work is confined to column writing and there is a column entitled, "Labor As Seen by Mr. Eggleston," and I think there was an article came out in the State Federation of Labor in which he was referred to as the Labor Editor.

Q. Do you recall the date at which the meeting was held in the Bowl at Wilmington?

A. No, but if you can show me a copy of the paper, I can recollect.

Q. I assume that you remember the day of the week the meeting was held down at Wilmington?

A. I am not sure. I think it was Friday.

Q. Did you have any conversation with Mr. Bridges prior to the time that the meeting was held here, and after the conversation you had with him on the evening when you were preparing the first story which I have asked you about?

A. I saw him before I went into the meeting, but I don't think that we—before he went into the meeting, but I don't recall any specific conversation. There was no conversation in which I took any subject of what he said for any [fol. 37] story. I mean, the story, when I got it down here, was the story of the meeting of the Wilmington Bowl.

Q. And did you have any conversation with Mr. Bridges over the telephone after that conversation you had with him that you have testified to and prior to the time the Bowl meeting was held?

A. I am not sure whether or not the day following—two days following the story about the wire that was sent to Madam Perkins—as to whether or not I can recall. We carried several stories. I think I did call him up to ask him whether it was correct that they were going to call this meeting, because I think when the story was sent from Los Angeles there was a few points Mr. Chandler wanted me to check and I did call Mr. Bridges.

Q. You recall calling Mr. Bridges and talking to him about that time?

A. Yes.

Q. What was the conversation with him?

A. I can't recall. I mean, I asked him if there was a story sent up from Los Angeles, referring to this meeting, and I mean, I think, when I talked to him originally—as to whether the meeting was being, or going to be held Wednesday or Thursday and he wasn't sure about that, and the office wanted me to find out exactly when the meeting was to be held, when, Wednesday or Thursday, and I guess it [fol. 38] was changed to Friday and I think formerly I asked him if he was going down to the meeting, and he said he was.

Q. Did you ask him what the purpose of the meeting was?

A. Well, I think the meeting was referred to in the stories that came up here as "stop work meeting".

Q. Did you ask Mr. Bridges for what purpose the meeting was?

A. Well, I think I did, and he said that that was what the meeting was about, to consider this problem down in the Harbor of San Pedro. I don't think I quoted him directly and it is difficult for me because I don't know but Mr. Bridges—I don't remember the exact connection in the conversation. If it is in the paper and I can read it, but I don't think in those stories I have quoted him directly and

so I wouldn't feel safe in saying I talked to him about any particular thing, but I did call him because I wanted to know when the meeting was going to be held and whether he was going down.

Q. Were you present at the entire meeting at the Bowl?

A. I think I was. I was present at most of it, although I did go out before the meeting and during the meeting looking for the telephone for the Western Union station that I might have to use.

Q. What time did the meeting start?

A. It was in the afternoon, I think probably around 2 o'clock.

[fol. 39] Q. How long did it last?

A. Oh, I think it lasted several hours, or two hours.

Q. Approximately how many people were there?

A. I think I mentioned in that story I wrote there 2500, or—although there may have been more or less than that, I think that is fairly approximate a total of the number of men in the place.

Q. Did anybody call the meeting to order; anybody preside, or anything like that?

A. I am not familiar with the officers of the local longshoremen's union, but I think it was one of them.

Q. Did you know any persons that spoke at that meeting?

A. Yes sir, Mr. Katz, Mr. Packard, Mr. Bridges, Mr. Schmidt—those are the four that I remember. I mentioned them in that story. Mr. Henry Schmidt.

Q. Who is Mr. Henry Schmidt?

A. He is the president of the San Francisco Local Longshoremen.

Q. Mr. Katz is the attorney here, or one of the attorneys associated with Mr. Wirin in this matter here?

A. That is correct.

Q. And Mr. Packard was the attorney associated with Mr. Katz?

Mr. Katz: John C. Packard, counsel in that case.

A. That is correct.

[fol. 40] By Mr. Luddy:

Q. Mr. Bridges spoke, did he?

A. Yes, Mr. Bridges spoke.

Q. Do you remember whether or not he was the last speaker on the program that day?

A. I do not recall that clearly. I think that Mr. Schmidt may have spoken after Mr. Bridges spoke.

Q. Do you remember what Mr. Bridges said at that time?

A. Well, in that story I refer to his speech, and I think I have quoted him briefly there.

Q. And when you say "that story", are you——

A. (Interrupting:) That is the one I wrote from the Wilmington Bowl.

Q. That is a story which appeared in an issue of the Chronicle of January 29th on the first page and under your by-line. Is that so?

A. That is correct.

Q. And had you written a story for your paper which appeared in the issue of January 28th—that is the day before the story appeared that you wrote from the Bowl at Wilmington?

A. I think I did. I think I wrote three stories while I was down here. I think I wrote one before and one after.

Q. Is the story which appears in the issue of Friday, January 28th on the front page under your by-line, the story written by you?

A. Yes, that is one of them.

[fol. 41] Q. Let's turn it over. I want to see it also.

A. That is the story I wrote on that date.

By Mr. Luddy:

Q. Tell us, as near as you can recall, what Mr. Bridges stated at that meeting that they held at the Bowl?

A. Well, I will say that I think that I included it in my story. What I wanted to get from Mr. Bridges—I quoted him only briefly. He spoke very rapidly, and in the first place they didn't seem to be talking about contempt there.

Q. What is that?

(Answer read.)

A. And I wasn't necessarily an invited guest at that meeting and I didn't feel safe in quoting Mr. Bridges extensively, because I do not take shorthand and I am not able to take a statement as it is dictated and I don't feel safe in quoting a person in that particular instance. I quoted him very briefly and I referred to his statements.

By Mr. Luddy:

Q. Well, of course, your training as a newspaper reporter trains you to——

Mr. Katz (Interrupting): I cannot hear you.
Mr. Luddy: I will withdraw it, then.

By Mr. Luddy:

Q. Will you say what Mr. Bridges said, as near as you can in substance and effect at that meeting, whether you can recall his exact words or not?

[fol. 42] A. I cannot recall his exact words. Can I see that story?

Q. Yes. I think you said, however, you quoted him only very, very briefly?

A. That is correct.

Q. But it is a fact, is it not, that he spoke for quite a few minutes?

A. Probably spoke about 15 or 20 minutes.

The Court: It is rather unusual where a witness is more careful about what he writes, than what he is going to say in court.

A. Well, this specific quote here (indicating), I can remember that. I mean, I remember the words "bread and butter". I mean, it so happens at that particular meeting I didn't take extensive notes. I was just sitting in the rear of the room and I didn't know the newspaper people were not invited. Usually in San Francisco at the union meetings, and particularly at longshoremen meeting- the press are included, and so I felt that was a situation down there. I had come 400 miles and I sat down in there near the door in the back row and started taking extensive notes and occasionally I would take out my pencil and jot them down and I didn't want anybody around there to stop me. Well, I was ordered to leave the office—I mean, the Bowl, so I didn't take extensive notes.

[fol. 43] Q. Are you talking now about a meeting at the Bowl? You are not talking about any meeting at the hall down there?

A. No, this was the Wilmington Bowl and it was the first time I had ever been there. I didn't feel very safe in writing the story and quoting Mr. Bridges in that story there. It contains everything I felt I could safely say; that is, without being inaccurate about anything, because I don't know whether you have ever heard Mr. Bridges speak or not, but he talks quite rapidly and unless I am prepared to take notes quite rapidly, I cannot catch them.

Q. Can't you recall anything at this time that was said particularly by Mr. Bridges at that meeting?

A. I can't recall anything beyond the quoted part that I attributed to him.

Q. Give us that. We don't have that.

A. I can give this to you. I mean, I can remember putting down that thing about bread and butter.

Q What about bread and butter?

A. "If the lawyers are handling the courts, we are going to go ahead and protect our bread and butter. There are lots of A. F. of L. unions don't go for that kind of stuff." There is a lot more here, and I wouldn't — safe in saying that I remembered anything else. I mean, in the interest of accuracy objectivity which the newspapers insist upon.

[fol. 44] By Mr. Wirin:

Q. What?

A. Objectivity, which the newspapers insist upon.

By Mr. Luddy:

Q. At the time you attended that meeting you wrote the story in the Chronicle of January 25, 1938, apparently page 7: "Longshoremen Call Stop Work Meeting." It is the 26th of January on page 7.

A. As I recall, I wrote this story, if this is one of the stories I looked up before I came down.

Q. One of the stories what?

A. That I looked up when I was served with a subpoena. I went back and looked through our files so as I could possibly—so as I would know what it was I was supposed to be questioned about, but I am quite sure I wrote that story; that is, if we look back in our ledger, I think I did.

Q. Now, do you recall the source of information upon which you based this story which appeared in the issue of the 26th headed "L. A. Longshoremen Call Stop Work Meeting"?

A. Well, as I recall, I think that was one of the Associated Press or United Press stories that I referred to the fact of the meeting down in San Pedro. In other words, they were going to call the stop work meeting, and we got the story up there. In the first place, Mr. Bridges was the national head of the union and we took and checked with his office and I recall I called him up there and asked him

if that was correct that they were going to call a stop work [fol. 45] meeting and he said yes, and I wrote that story there.

Q. I notice in this particular story on three separate occasions you quote Mr. Bridges. Where any statements appear to be in quotes in that article by yourself, from Mr. Bridges, it means, doesn't it, that Mr. Bridges made that statement to you in substance or effect, even if it is not letter perfect?

A. He said that statement to me, yes.

The Court: On three occasions there. Show him that statement. Did he make that, too?

Mr. Luddy: Yes. (Exhibiting document to witness.)

A. Oh, it is all a part of the same thing.

By Mr. Luddy:

Q. That is to say, anything that appears in this article in quotes as coming from Mr. Bridges represents statements that Mr. Bridges did, in fact, make to you before you caused the story to be published?

A. That is right.

Q. Did Mr. Bridges on or about January 26th, or January 25th, 1938, make the statement to you referring to stop work meetings called occasionally by the longshoremen as follows: "We called one here just before we affiliated with the C. I. O. in Seattle. We have an agreement with the ship owners to call them every Thursday at 6:30 a. m."

A. P. M.

Q. That appears in the article you just referred to. Did [fol. 46] Mr. Bridges make that statement to you in substance or effect?

Mr. Wirin: He said they appeared in the article.

The Court: Or in evidence.

Mr. Luddy: I think the best evidence is the witness' statement as to what he said.

A. As I recall, those were quotes I got from Mr. Bridges which I wrote in that story after I had talked with him.

By Mr. Luddy:

Q. Did Mr. Bridges advise you in the interview you had with him at the time you were getting material for this

story, that the Friday afternoon meeting was called by the local so that the entire San Pedro membership could attend, and Mr. Bridges was the scheduled speaker?

A. What is that? What do you mean? (Looking at paper). Are you referring to some particular paragraph.

Q. I am referring to the paragraph which appears to be the second paragraph under the sub-heading, "Receivership Postponed."

A. Yes, I quote Bridges. That is, I attribute that directly to him. I say that Bridges said the Friday afternoon meeting was being called.

Q. Keep your voice up.

A. I am sorry. Well, this paragraph here that you referred to says, "Friday Afternoon Meeting was called by [fol. 47] the local, Harry Bridges, president of the Pacific Coast Longshoremen said here (meaning San Francisco) so the entire San Pedro membership can attend." And I asked Mr. Bridges if he was going to go and speak there, and he said he was. I remember that.

Q. Did Mr. Bridges tell you in that interview that stop-work meetings are called occasionally by the longshoremen?

A. Well, I quoted him there as saying that.

Q. Did he make that statement to you?

A. He made that statement, yes sir, the statement I quote there.

Q. Did Mr. Bridges make a statement to you in that same interview that Judge Schmidt's ruling was an automatic order to close up every port on the coast?

A. May I see that, please? His reference there was to the receivership down here, and as I quoted him there, I feel safe in saying that is the quote.

Q. In other words, you are safe in saying are you, Mr. Resner, that Mr. Bridges on the 25th of January, 1938, in an interview that you had with him in which you were discussing the matter of this stop strike meeting that was going to be held at the Bowl, made the statement to you that Judge Schmidt's ruling was an automatic order to close up every port on the coast and that no one is going [fol. 48] to force the longshoremen back into the A. F. of L.?

A. Well, may I explain this just a little bit?

Q. You may.

A. As I say—I mean, my managing editor told me to be safe about what I said, and the point is, I was called down

here to testify as to certain things I had written and to say I had written them. That is correct, and everything I had in quotes there, I can stand by. That is the fact, but when I say Judge Schmidt, or say that Bridges protested the ruling, or something like that, I didn't put him in quotes, and as I say, we are always careful to do that. That is the reason for the quotations, so I don't know whether he referred specifically to Judge Schmidt or I don't recall that, and I won't be safe in saying anything he said except what was in quotes.

Q. In any event, you wrote the story immediately after you received the information?

A. Yes, right.

Q. And certainly your recollection as to any statements Mr. Bridges made to you was fresher then than now?

A. Everything actually in quotes I feel fairly safe in saying was accurate.

Mr. Wirin: May those articles be marked for identification so that we can have them?

Mr. Luddy: I intend to. I will present them all, so they [fol. 49] can be marked here. The witness, if the Court please, has already identified several articles and although he has stated direct from the witness stand that the matters appear therein, the statements were made to him, I think we should present them, not only in connection with the witness' testimony, but also with respect to the allegations in the pleadings with respect to these matters. We want to put in at this time, copies of the San Francisco Chronicle, or those portions rather, that have been marked, the issues of Friday, Saturday and Sunday, January 28th, 29th and 30th, 1938.

The Court: What is that, January 26th?

Mr. Luddy: I think there is one on the 26th. Do I have it here, Mr. Praeger?

The Court: January 26th will be People's Exhibit 2.

Mr. Praeger: 25th was People's Exhibit 2, if the Court please.

The Court: 25 is right.

Mr. Luddy: Here is the one on the 26th down underneath and it is the article which appears upon page 7 of the issue of the 26th. The particular article in each exhibit is marked however, so that it can be identified—is marked with blue pencil. I just want those portions that are marked.

The Court: Any objection to them being made as an exhibit together?

Mr. Katz: My objection is that this one is only a portion [fol. 50] of the article which the witness says contains quotations of Mr. Bridges, and they are not binding upon him, and the only portion of the exhibit which would be binding upon him should be limited to the quotation.

Mr. Luddy: No, I think not. I think the witness stated that Mr. Bridges made a statement, and whether it appears in quotes, or not, if he now makes the statement that Mr. Bridges made that statement and it appears in the article, it is just as effective.

(Argument.)

The Court: All right. The articles will be admitted for his testimony, as much as anything else, and the objections will be overruled. The issue of January 26th is People's Exhibit 3, and the issue of the 28th—I don't recall definitely whether he spoke about the 28th, but I think he did about the 29th.

Mr. Luddy: The 28th, I think is the story.

The Court: All right. The 28th, 29th and 30th will be People's Exhibit- 4, 5 and 6, and the next figure there will be 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m. of the same day, Tuesday, September 6, 1938.)

[fol. 51] Tuesday, September 6, 1938: 2 O'Clock P. M.

Lawrence Resner, resumed the stand:

Mr. Luddy: That is all on direct, Mr. Resner.

Cross-examination.

By Mr. Katz:

Q. Mr. Resner, as I understand your direct testimony, whenever a question arises which vitally affects the longshoremen operations, you call the C. I. O. office, do you, in the ordinary course of your business to get some information about that question?

A. Well, if I am the one person to do that. I am one of a number of reporters and some of the others have done that too. I have done it quite often, myself.

Q. Do you know that is the custom in obtaining information of the C. I. O.?

A. Generally, yes.

Q. Did Mr. Bridges or Mr. O'Neil first call you to give you any information?

A. I think—(hesitating).

Q. I will reframe the question. Did Mr. Bridges call you first, or did you first call Mr. Bridges?

A. I think I testified the way this story first came to our [fol. 52] attention was that when the News came out there was a story on the telegram and our city desk noticed that, and I think asked me to check with the C. I. O. on that story and I called up Mr. O'Neil.

Q. Did Mr. Bridges tell you to write any story, or was it your superior who told you to write the story?

A. My superior.

Q. Did Mr. Bridges ask to give you any information at all?

A. No.

Q. And whatever statement Mr. Bridges made, did he give them in answer to your questions to him, substantially?

A. When I called him up, I asked him about this situation, if he could tell me what that was about, and then he proceeded to tell me, and I questioned him about a couple of things that weren't clear to me asking for information, but more or less he gave the information to me after I asked him to describe it.

Q. Now, do I understand your testimony to be that the matters within the statement, or the statements in quotations are, in substance, what Mr. Bridges said?

A. I said they are not letter perfect, but in substance what Mr. Bridges said, yes.

Q. In one of these articles a meeting is referred to as a protest meeting. Do you recall Mr. Bridges using any lan- [fol. 53] guage in referring to that meeting, except to say that it was a "Stop work meeting"?

A. Do you mean—which meeting is that?

Q. Well, in one of these articles you refer to the meeting as a "Protest meeting," and I want to know whether the words, "Protest meeting" is your language, or the language of Mr. Bridges, for in your article you refer to it most generally as a "Stop work meeting."

A. I testified that in these Associated Press stories that came up from San Pedro—it may have been United Press

story, that the story referred to that as a "Stop work meeting," and I called him up to ask him if that is correct, that is what it was, and he said yes. Of course, he explained.

Q. You don't know whether Mr. Bridges called it a "Protest meeting"?

Mr. Luddy: Just a moment. He hadn't finished his answer.

A. I was simply going to say he referred to this here as a "Stop work meeting".

The Court: He is asking whether they were Mr. Bridges' words, or not, "The protest meeting"?

A. Which story there?

By Mr. Katz:

Q. The article in connection with the alleged statement of Mr. Bridges where he is alleged to have stated it was a "Protest meeting".

[fol. 54] A. You have two different statements there. I think you are referring to the original story. I am not sure.

Q. January 25, 1938. Am I right in presuming, because it is not quoted, that this is only your language, "Bridges said he intended to leave here for San Pedro where members of the C. I. O. local intend to hold a mass protest meeting beginning Wednesday or Thursday." That is not quoted. Is that your language?

A. That is my language. I have not quoted in there. I mean, I don't know whether he used the word "protest" or not. I don't recall that, although he may have. I can't say with certainty that he did.

Q. Did you tell Mr. Bridges that the information which he was giving to you in answer to your question in San Francisco was going to be put on the Associated spike and released in other places besides San Francisco?

A. Well—(hesitating).

Q. You can answer that yes or no.

A. No, I didn't tell him anything like that.

Q. Did Mr. Bridge give you any instructions about releasing that information, otherwise than in San Francisco?

A. No.

Q. And when you called up, you called on behalf of the San Francisco Chronicle?

A. That is right.

Mr. Luddy: That is objected to upon the ground that it is immaterial.

The Court: Overruled.

A. He never gave any instructions on any publicity.

By Mr. Katz:

Q. Did he give you any instructions on this telegram?

A. Never.

Q. Did you determine what matters were to be published?

A. Yes. Let me make it a little clearer the way we do business up there. We set up a publicity office to take care of pamphlets and releases and everything for all affiliated C. I. O. unions, and my office is the only one to determine what goes out, because there are times when [fol. 79] Mr. Bridges may be absent a month and a half on business and naturally, we can shut up shop during times like that, and it is all determined by me.

Q. Did you do anything with relation to this telegram that you had not done at other times in your business with the news business of the C. I. O.?

A. Straight routine—followed the straight routine of all telegrams and correspondence.

Q. Did you have any conversation wtih Mr. Bridges before you released the telegram to the newspapers?

A. No, I did not.

Q. Now, I presume you could have, but did not contact either the Associated Press or United Press that night, did you?

A. I didn't contact either one of them.

Q. When you really seek to get a great publicity break, as a newspaperman, you do contact the Associated Press and United Press, do you not?

A. I usually get the wire services first in a case like that, but you see down here where the story was breaking in San Pedro the Longshoremen's Local has a new service of its own and we don't attempt to supercede them.

Q. Did you send copies of telegrams to the Los Angeles newspapers?

A. I never send anything down to Los Angeles.

[fol. 80] Q. Did you send a copy of the telegram to anybody in Los Angeles?

A. I did not.

Q. The only newspaper that you called was the local San Francisco News. Is that correct?

A. That is correct.

Q. Now, you said something about one of the reasons for the existence of a publicity department of the C. I. O. was because you wanted to get the facts concerning the C. I. O. before the public truthfully. Do I understand you correctly?

A. That is correct.

Q. Will you explain that a little further?

A. Well, since the C. I. O. started here on the west coast we have had great difficulty in getting the truth about our aims and activities in the papers. Those papers who didn't distort them are more or less inclined to leave them completely out of the paper—no news at all, but various excuses were given why they couldn't get in contact with us, and it is a new and up to date way of doing business when you have an organization like we have, to have a publicity man who can find out what the facts are.

Q. Was it your experience that the public somehow managed to get the information about the C. I. O. anyway; has that been your experience, that it usually got [fol. 81] out and usually was garbled in some manner?

A. Yes, for instance during the strikes there wasn't a telegram that went out of the unions over the entire Pacific Coast that didn't leak out almost before the man to whom they were sent received them, and we know that all of our 'phones have been tapped, and we know all that was going out up there.

Q. Is there an established policy of the C. I. O. that all correspondence—important correspondence should go to the press; correspondence which you felt was important?

A. I don't understand the question.

Q. Do you know whether there was a policy overe some period and duration to the effect that all of the important correspondence which you consider to be noteworthy, or newsworthy, involving appeals to public officials, that such appeals should be made public?

A. Oh, yes, always has been, on numerous occasions.

Q. Can you give us any examples when that policy was pursued?

A. Yes, the C. I. O. released telegrams to the press in connection with the vigilantes activities at Westwood in connection with the beating of the miners at that time at Nevada City and in connection with the reign of terror in

New York City, and in connection with the reign of terror [fol. 82] in the gulf area at New Orleans.

Q. Did they all involve policies whereby telegrams were made public?

A. Yes, we wired to the Congressmen of the Government on various occasions. Madam Perkins and various Government officials many times.

Mr. Katz: I think that is all.

Redirect examination.

By Mr. Luddy:

Q. Did you ever help Mr. Bridges formulate any telegrams, or discuss the contents of proposed telegrams?

A. No, never. Mr. Bridges usually handles his own.

Q. You have stated that this publicity bureau was set up, and the reason for setting it up. Under whose authority was this bureau set up and created, do you know?

A. You said, "Whose authority"?

Q. Yes.

A. Under the authority of the director of the west coast C. I. O., Mr. Bridges.

Q. And the functions of the bureau were discussed with Mr. Bridges at the time he authorized the setting up, and in fact set up the bureau, were they; that is, the purpose it was to serve?

A. Yes sir, certainly.

[fol. 83] Q. That was all discussed with Mr. Bridges?

A. Yes.

Q. The mechanics as to how it was to operate was discussed with Mr. Bridges.

A. He pretty much left the mechanics to me.

Q. I know, but when you were getting it set up and discussing the purposes and functions it was discussed generally with him, wasn't it?

A. Not anymore than in just a general way. He put me in charge and told me to run it and held me accountable.

Q. He said, "O'Neil, you are in charge of this and you are personally accountable." Is that it?

A. That is the idea.

Q. Assuming that there was a telegram, either received by Mr. Bridges or dispatched by him, if it was a telegram which Mr. Bridges did not want released by the press, it wouldn't come from his office to your desk?

A. I couldn't say about that.

Q. You don't know of any telegrams he didn't want released that were not sent to your desk as a matter of routine?

A. Every day any telegrams on my desk that weren't to be released—if it wasn't to be released, it wouldn't be sent to the bureau.

Q. As a matter of fact, if Mr. Bridges didn't want it [fol. 84] released, it wouldn't come to your desk?

A. Not at all.

Mr. Luddy: That is all.

Recross-examination.

By Mr. Katz:

Q. You mean, no telegrams have come to your desk that you didn't publicize?

A. Oh, yes.

Q. That is, you determine what is to go out?

A. That is correct.

Q. You do know of instances of telegrams which involved very private activities coming down to your desk and you did not publicize them?

A. That is correct.

Q. Now, do you know of the existence of any requests upon the C. I. O. by Government officials soliciting notice from the C. I. O. concerning any impending labor difficulty? Is that question clear?

Mr. Luddy: That is objected to upon the ground that it is not proper cross examination and it purports to assume some allegations which appear in the answer and it seems to me to be entirely out of order at this time.

The Court: Even so, this witness is going back to San Francisco. You may answer it.

[fol. 85] By Mr. Katz:

Q. Is that question entirely clear?

A. No, I am afraid it isn't.

Q. Do you know whether Government officials have, from time to time, requested that the C. I. O. notify them of any impending labor difficulties on the west coast?

A. Yes, we have had cases of that when they wanted to be kept informed of what was pending out here, whether there was a contemplated tie-up or one thing or another.

Mr. Katz: That is all.
Mr. Luddy: That is all.

By the Court:

Q. The newspaper story I noticed on January 24th it didn't contain a telegram. You gave it to them, I understand, directly?

A. I believe I did read that telegram over the 'phone to them, Judge. They just didn't have the space at the time.

By Mr. Luddy:

Q. By the way, this story you gave the newspaper, the newspaper was just going to press at the time?

A. From the place it was placed in the paper, I would say they were just about to go to press.

Mr. Luddy: That is all. Mr. Katz, I would like to have you take the stand and ask you a few questions.

[fol. 86] Monday, September 12, 1938; 2 o'clock P. M.

(After recess).

Harry R. Bridges, having been called as a witness, in his own behalf, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wirin:

Q. What is your occupation?

A. President of the International Longshoremen's and Warehousemen's Union.

Q. How long have you been president of that organization?

A. Since its inception as the International Longshoremen's & Warehousemen's Union, and prior to that time, when it was The International Longshoremen's Association.

Q. What are your duties as President of that organization?

A. That would require some description of the organization. Of course, the organization is a coast organization

with locals on the Pacific Coast, in continental United States, British Alaska, Hawaii, as well as the East Coast and South Atlantic Coast.

Q. How many members, approximately, are there, or [fol. 87] were there in January, 1938?

A. Of the International Longshoremen's and Warehousemen's Union, around 28,000.

Q. How many members were there, approximately, on or about the 28th day of January, on the Pacific Coast?

A. Around 13,000. Just a minute. Around 23,000. I thought you meant Longshoremen members in the first place.

Q. Do you hold any office in that organization?

[fol. 88] A. I am the West Coast Director.

Q. And how long have you been a longshoreman?

A. Since 1922.

Q. Now, in connection with the sending of the telegram which was set forth in the papers here as having been dispatched by you on or about the 24th day of January, 1938, tell us when and under what circumstances you first learned of Judge Schmidt's decision in the case, which has been called here "The Walker Case"?

A. I am not quite sure whether I first learned of it through the newspapers or through long distance phone call from San Pedro. I think my first recollection—my best recollection at this time; the first time I definitely got the official information was through a phone call on the Monday I sent the telegram.

Q. Did you send a telegram on the same day that you first received that information?

A. To the best of my recollection, yes.

Q. Now will you describe to the court what you did with respect to the sending of this telegram?

A. Well, I wired the—I drew up the telegram.

Q. Did you dictate the telegram to your secretary or some person in your office?

A. I just dictated the telegram to my secretary and asked her to send it along with the other telegrams.

Q. Did you, at the same time, send a telegram with re- [fol. 89] spect to some subject matter to any other persons?

A. I sent it to the President of the Maritime—Chairman of the United States Maritime Commission, and the National Labor Relations Board.

By the Court:

Q. Do I understand this is the same telegram, or another telegram?

A. Substantially the same.

By Mr. Wirin:

Q. Had you, prior to the time you dispatched the telegram on January 24, 1938, to the Secretary of Labor; had you prior to that time had any communications with the Labor Department with respect to any labor matters?

A. Many times.

Q. And will you give us the circumstances of the occasions under which you communicated with the Department of Labor prior to that date?

A. Well, in answering the question——

Mr. Luddy (interrupting): May it please the Court, that is objected to upon the ground that the charge is not that there was any attempt committed in having sent a telegram to Madam Perkins nor anybody else, and all that is material is that it was released for publication, and therefore, any telegram he may have sent to Madam Perkins or anybody else is immaterial.

The Court: Give me the exact question.

(Question read).

Mr. Wirin: The purpose of the question——

[fol. 90] The Court: I am not interested in that so much as I am in the fact that you are going into the history of communications here.

Mr. Wirin: It will be very brief.

The Court: You may answer it.

A. In the first place, after 1934 when our organization was fully completed—since that time we have been in constant touch with the Department of Labor and we have a definite working understanding with the Department of Labor and also other government agencies that at any time a tie-up is looming, expected, they wish us to notify them either by long distance phone, by their representatives on the coast here, which they have three or four of, or directly to the Secretary, herself, or her assistant, and it has always been our custom, and the duty of myself as the head of our organization to immediately contact the Department of

Labor, and they have requested us to do this in many cases. We have had the same request from the President, also.

Q. With respect to the Department of Labor, without going into it and consuming considerable time, will you give us examples where the Department of Labor have taken, or shown concern and taken action with respect to any longshoremen's difficulty.

Mr. Luddy: That is objected to on the ground that it is immaterial. It is only with the publicity given to the telegram that we are concerned, and it is immaterial.

[fol. 91] The Court: Overruled.

By Mr. Wirin:

Q. Will you answer the question?

A. There would be many instances. I—I can recall a few off-hand. After 1934, the latter part of 1934, and all during 1935 and in the middle of 1935 we were sent back to Washington to a conference with the President, and in 1936 and on two or three occasions in 1936—of course, winding up with 1936 with the maritime strike that the assistant Secretary of Labor took charge of and came out here; and on two or three occasions the Department of Labor has consulted me with regard to the particular jurisdiction in dispute and A. F. of L. and C. I. O., since we changed over, and I have given them full information on it and what I thought might happen, because they always wished to know, and the last time was just four or five days ago when the National Maritime Labor Board again sent out a telegram asking my opinion if trouble was going to develop. That is the newly created National Maritime Labor Board, apparently taking it over from the Department of Labor.

Q. During these particular instances have you sent telegrams to the Department of Labor?

A. Yes, communicating either by telegram or long distance phone, or by talking to one of the representatives.

Q. Will you tell us briefly under what circumstances and on what case you received requests from the Department of Labor for information or for a report concerning the labor [fol. 92] difficulties?

Mr. Luddy: That is objected to on the ground that it is immaterial. It is only the matter of the publication of the telegram to Madam Perkins that is material.

The Court: That isn't the only thing. He may answer the question.

A. On any occasion when a labor dispute is liable to cause a strike, the Labor Department sends out regular question-aires to the various unions to fill out, and I get them regularly and always—although it is not compulsory to fill them out, we do as a matter of cooperation—as to what is the dispute, and the number of men involved at any time in any dispute looming up, or a tie-up, we get a request from the Department of Labor. The question-aire asks whether it will be a long dispute, and we always answer as best we can.

Q. Do you recall on or about January 24, 1938, whether you had any conversations or conferences with any representatives of the Water Front Employers' Association, and if so, who?

A. January 24th was two or three days after the Court ruling was made. That is correct?

Q. That is correct.

A. I think it was on that day, so far as I can remember—I think it was on that day I had a conference with Mr. Armond Roth, President of the Water Front Employer's Assn.

Q. How long has he been the President of the Water Front Employer's Association?

[fol. 93] A. Almost two years.

Q. Will you relate the substance of the conversation?

Mr. Luddy: That is objected to as immaterial and absolutely hearsay.

Mr. Katz: What we intend to prove is what Mr. Bridges did and said under the contract. May we *made* an offer of proof?

The Court: Overruled. He may answer.

A. Well, it is natural, of course, as Mr. Roth is the Coast President of the Employer's Association acting in this jurisdiction and I am the Coast President of our organization, and any dispute that arises with any of the locals, he contacts me or I contact him, and I forget whether this particular conversation came about through him calling me first, but it was particularly about the stop work meeting to be held and I explained to him that the man and the officials were doing the only thing they could to straighten out the matter so the men could stay on the job, and he said:

"Well, I just want to notify you that we intend to proceed against the union for damages for the delay it is causing the ships, and so forth," and I asked him what his position on the Court Order was, and he said, "We can't take a position one way or the other." And I said, "I can't see where this leaves us, because, as we view the court order, the men in San Pedro will be locked out." So far as what he said on that, he said, "It may mean that," and he recognized might mean that, but he said, "We can't [fol. 94] interfere one way or the other or we will be violating the Wagner Act, which would be worse that what you fellows are up against." So we didn't get very far in the conversation, but we recognized it could cause a tie-up on the whole Pacific Coast.

Q. Did your conversation with Mr. Roth, whatever its nature was, have anything to do with the dispatching of the telegram to the Secretary of Labor and other officials you have mentioned?

A. Well, it was a factor.

Mr. Luddy: Just a moment. That is a question that can be answered "yes" or "no" and leave me an opportunity to object. It simply asks if the conversation had anything to do with it.

A. The answer is "yes."

By Mr. Wirin:

Q. What was the relationship?

A. The Labor Department is a third party to our contract.

Mr. Katz: That is in already, your honor, by reference. Proceed.

A. (Continuing): Over a period of years, or over quite a long period there has been a constant stream of complaints from our employers to the Labor Department, complaining that we were not conforming to our contract; that we were violating our contract. In some cases these complaints worked against us and naturally, after talking to Mr. Roth, and in view of the other factors in the case, and, of course, the Labor Department is really a third party to our contract and that definitely had a part in the [fol. 95] sending of the telegram.

Q. Now, let me return with you to the situation with respect to the sending of the telegram. I believe you testified you dictated it to your girl. Now, will you tell us as well as you can remember now, what happened to the telegram and what you did with it after you finished dictating it to your secretary?

A. It is really hard for me to remember specifically. We sent a lot of telegrams, and we write a lot of letters and I guess it was handled just as we always do; I told my secretary to take the telegram and send it.

Q. Do you recall what you, yourself, did with the telegram?

A. That was the end of it, so far as I was concerned.

Q. Did you ever, at any time, hand the telegram over to Mr. O'Neil?

A. Not to the best of my recollection at this time.

Q. Did you have any conversation with Mr. O'Neil about the telegram?

A. Not that I can recall.

Q. Did you give any directions or instructions to Mr. O'Neil as to what he should do with the telegram?

A. No, I can't remember that I am pretty sure that I never gave him any definite instructions.

Q. Now I call your attention to the text of the telegram. Now, I call your attention to the following sentence: "Attempted enforcement of Schmidt decision will tie up Port [fol. 96] of Los Angeles and involve entire Pacific Coast." I will ask you to explain that in terms of what you had in mind when you sent the telegram; what you meant by that statement.

Mr. Luddy: I submit that the statement speaks for itself, and I object to it on the ground that it is calling for a conclusion of the witness.

The Court: I am going to suggest that counsel may stipulate that what he says in his affidavit may be accepted as an explanation of the telegram.

Mr. Katz: Yes, we will accept that stipulation.

Mr. Luddy: Yes, your Honor, You- Honor is referring to the so-called Bridges affidavit?

The Court: Yes, the one that is referred to in count one.

Mr. Praeger: Referred to in count one?

The Court: Yes.

Mr. Luddy: As we understand it, your Honor proposes

the stipulation in lieu of the question just asked; that it may be stipulated that the explanation which he made in there as to the tie-up and so forth, the meaning of that is as set forth in the Bridges Affidavit.

The Court: That is correct; the explanation he has already given in the affidavit.

Mr. Luddy: That is correct.

The Court: Satisfactory to both sides?

Mr. Wirin: Yes.

The Court: I understand that it is, from the direction [fol. 97] in which the heads move.

By Mr. Katz:

Q. Now, let me ask you to tell the Court in a general way, so far as the procedure of your office is concerned, what communications or matters came to the desk of Mr. O'Neil?

A. Practically all of them, unless small matters—he won't get bills, or minor communications of minor importance, but any important matters, at some time or other all go over Mr. O'Neil's desk. Of course, I might explain it this way: We have a publicity man and he is supposed to be the expert on that—not me, of course,—and it is necessary, we have found, to have a good publicity man and he has got to know the background of the situation and what is going on along behind the scenes and have a right to publish, or otherwise it is mechanical only, and if he is asked questions, he can't answer them. We kept no secrets from Mr. O'Neil, and he is in charge of that department and very few communications of any importance, or anything of importance, ever went through my office that Mr. O'Neil doesn't see them at some time or other.

Q. Were all communications directed to Mr. O'Neil's desk limited to communications that required publication?

A. No, not by any means.

Q. Then, give us some example of matters that would come to Mr. O'Neil's desk in the ordinary routine that were not for publication?

[fol. 98] A. Well, we have many labor disputes come up; we might have a dispute in the northwest and I might wish them to adopt a certain kind of strategy against the employers; for example, well, we don't turn this over to Mr. O'Neil directly, but we turn it over in some other way. We don't expose the matter to our employers. So these matters

would not be published and O'Neil knows that, and communications of that type would be sent to him for his information; not for publication, so he is informed at all times.

Q. With respect to communications which reach Mr. O'Neil's desk, who determines whether or not they will be [fol. 99] published and what publicity shall be given to them?

A. O'Neil is given full charge. I might say we try to handle our organization that way. We don't hire a publicity expert and then tell him what to do, or have him told by people who are not publicity experts, and I am not a publicity expert.

Q. Now, with respect to the sending of the telegram to Madam Perkins, I call your attention to the date of January 2[illegible]. What was your information, if any you had, on that date at the time you sent the telegram as to whether or not a motion for a new trial was pending, or had been filed?

A. I never knew a thing about it.

Q. What was your information at that time as to whether or not a proceeding had been filed to vacate the appointment of a receiver?

A. I knew nothing of it.

Q. And what was your information at that time concerning the filing, or the pendency before Judge Schmidt of a motion to vacate the permanent injunction entered by Judge Schmidt?

A. So far as I remember, I knew nothing of that either. We—well, we have our attorneys in Los Angeles, and we have our attorneys in San Francisco, and we have enough work to do without trying to do their work. We leave them to take care of those things.

Q. Now, when you sent the telegram to Frances Perkins, [fol. 100] did you intend by the sending of that telegram to influence Judge Schmidt with respect to any matters pending before him?

Mr. Luddy: That is objected to as being immaterial, as to the statement of his intention. The telegram and the circumstances under which it was published speak for themselves.

The Court: The question had to do with the question of the sending of the telegram.

Mr. Katz: I will follow that up as to device, or conspiracy.

The Court: The witness understands just the sending of the telegram and what?

The Witness: What was the quesion?

The Court: The answer is "No."

The Witness: I don't remember the question. At least, I thought the question——

Mr. Katz: Read the question.

(Last question read.)

A. The answer is no, we weren't even thinking of the Judge at that time.

By Mr. Katz:

Q. Now, under what circumstances, as best you now recall, did the telegram to Frances Perkins get in the newspapers? Now, with respect to this, let me change the question for a moment. You were in court when Mr. Resner testified as a witness, were you not?

[fol. 101] A. I was.

Q. With reference to your conversation with Mr. Resner over the telephone, do you recall in the first place, whether or not you communicated with him, or he communicated with you, which resulted in that telephone conversation?

A. I couldn't say specifically, but my impression is that he communicated with me, because he generally does. I don't call him up.

Q. What is you best recollection as to whether or not any reference was made in the course of that conversation concerning the telegram to Frances Perkins?

A. I couldn't recall specifically, but if I heard Mr. Resner's testimony and if Resner says that he called me up to ask me about the telegram or the general situation, I would say that that is the truth of the matter, but I cannot recall specifically what he said or what his ultimate remarks were when he called me up.

Q. Well now, let me ask you did you, when you sent the telegram to Frances Perkins, or in any connection or step that you took with respect to that telegram, intend to warn Judge Schmidt that a tie-up would result so as to induce him to change his mind?

Mr. Luddy: That is objected to for the reason that the question, whether he had a specific intent to warn Judge Schmidt, is immaterial and the lack of a specific intent, if

[fol. 55] Q. You didn't state you were also acting, did you, for the Associated Press carrying news throughout the country?

A. I never did that. The Chronicle works for itself.

Q. Now, I believe you mentioned the names of Mr. Katz and Mr. Packard, Mr. Bridges and Mr. Schmidt as speaking at that meeting. Do you recall whether Mr. Roy Donnelly spoke?

A. I think he did, although I cannot remember a word that he said.

Q. Do you recall whether a Mr. Bowen and Mr. Brown spoke?

A. Well, there were several, as I understood, officials of the Longshoremen's Union that spoke there and I was not familiar with their names, and there were several other speakers and I am not sure whether those were the ones.

Q. You were advised that this meeting had been closed to the public, were you not?

A. That is my general understanding, and I attended Longshoremen meetings before and they told me always to keep the newspapers out of their meetings, or newspaper men, I guess.

Q. Did I understand you correctly, Mr. Resner, when you say that you got the understanding that it was a mass protest meeting from what you read in the Associated Press wire?

A. You are referring to two different stories. In this original story, the one the morning of Tuesday, January 25th, which is the original story that contained most of the text of the telegram to Secretary Perkins, I see here where [fol. 56] I refer to this as a mass protest meeting, and I said I don't recall whether he said that it was a mass protest meeting or not. It seemed to be my understanding it was. However, on this meeting several days later, the stop work meeting, my first idea that it was a stop work meeting came from the wire that I had read that day, and I called up Mr. Bridges to ask him if that was what it was, a stop work meeting.

Q. What did he say?

A. He said yes; that is, he said it was a stop work meeting.

Q. Having attended that meeting you know, as a matter of fact, it was a stop work meeting?

Mr. Luddy: That is objected to upon the ground that it is calling for a conclusion of the witness.

The Court: If it is going to be important, I would like to have somebody tell me the difference between a stop work meeting, and a protest meeting.

Mr. Katz: We can, your Honor, but I will agree that this is not the man to do it. I will withdraw the question. That is all.

Redirect examination.

By Mr. Luddy:

Q. You said, with respect to this first story and the interview you had with Mr. Bridges with respect to the first story, that you didn't print anything he asked you not to [fol. 57] print. That is correct, is it not?

A. That I didn't print anything he asked me not to print?

Q. You were asked the question in Mr. Katz's cross examination of you.

A. That is correct.

Q. Now, it is a fact, is it not, that nothing that appears in the story of Tuesday, January 25th, by you, as credited to Mr. Bridges, which Mr. Bridges told you not to print?

A. You mean, anything in here (indicating)?

Q. That you have credited to Mr. Bridges, represents matters that you got from Mr. Bridges in this interview, and none of this represents any matter that he told you not to print?

Mr. Katz: To which we object upon the ground it is incompetent, irrelevant and immaterial. I don't think a person has a right to go that far in connection with the case.

Mr. Luddy: I will withdraw the question. I think we have a little foundation that might make it a little clearer.

By Mr. Luddy:

Q. You knew Mr. Bridges, did you not, before Tuesday, January 25th, or Monday, January 24th?

A. Yes.

Q. You had been a newspaper reporter on the Chronicle how long before that time?

A. Between two and three years.

[fol. 58] Q. And you had frequently before January 24, 1938, covered labor matters in which Mr. Bridges was interested, had you not?

A. Yes.

Q. And I suppose on a large number of occasions prior to January 24, 1938, had interviewed Mr. Bridges in your capacity as a reporter for the Chronicle?

A. That is right.

Q. And had, as a result of your interviews prior to this date, they appeared as a matter of routine in your paper, did they?

A. Yes.

Q. I take it there was no question but that Mr. Bridges knew you were a reporter for the Chronicle when you called on him to interview him?

A. I am sure he did.

Q. During the course of that interview you had with Mr. Bridges that night, did he give you any information and then ask you not to print it?

Mr. Katz: I object to that upon the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. I don't recall any specific instruction like that. I think that when I quoted him in here, I quoted him correctly. I don't recall him telling me anything like that.

[fol. 59] By Mr. Luddy:

Q. Then may I say here, that anything that you have printed in that article is matter that you got from Mr. Bridges, and matter he gave you without the request that you not print it?

A. Everything in quotations—that appears in quotations, was given me by Mr. Bridges, and so far as I know there was no restriction on printing it.

Mr. Luddy: That is all.

Mr. Katz: That is all.

Mr. Luddy: That is all, Mr. Resner.

The Witness: Am I all through, now?

Mr. Luddy: I think you may be excused, so far as we are concerned. Do we want Mr. Resner?

Mr. Ashburn: I don't think so.

The Court: You may be excused.

[fol. 60] Arthur Eggleston, called as a witness by the People, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

A. Arthur Eggleston.

The Clerk: How do you spell the last name?

A. E-g-g-l-e-s-t-o-n, Eggleston.

Direct examination.

By Mr. Luddy:

Q. Mr. Eggleston, where do you reside?

A. In Berkeley.

Q. And you are a newspaper man employed in San Francisco by the Chronicle, are you not?

A. Yes, sir.

Q. And how long have you been employed by the Chronicle?

A. Since March, 1936.

Q. During January of this year and prior thereto, had you conducted a column which appeared daily in the Chronicle?

A. Yes sir, six times a week.

Q. And in connection with your writing for that paper, had you prior to January 25, 1938, had occasion to interview Mr. Harry Bridges?

A. On several occasions.

Q. And on any occasions that you had to interview Mr. [fol. 61] Harry Bridges with respect to labor news had he, on occasions, referred you to anybody else as a source from which you might get answers to questions you asked?

A. Yes, sir.

Q. To whom had he referred you?

A. Well, O'Neill, the publicity man.

Q. On how many occasions would you say that prior to on or about January 25, 1938, Mr. Harry Bridges referred you to Mr. O'Neil, the publicity agent for the C. I. O. and you asked Mr. O'Neil for information which you were seeking?

A. Well, I couldn't say the number of times. I might explain it this way; that I would try first to contact Mr. Bridges, and perhaps it was with respect to a matter in which a release was to be made, in which case, if the release was being prepared, or had been made, he would refer me to Mr. O'Neil as the man to release it.

Q. Are you able to give us any estimate at all as to the number of times you were referred to Mr. O'Neil by Mr. Bridges prior to on or about January 24, 1938?

A. No. It would be a pure guess. Probably more than once, however.

Mr. Luddy: I guess that is all. Just a minute.

By Mr. Luddy:

Q. Would you say that it might have been as many as a half a dozen times?

A. Well, if I knew about the time that they set up their [fol. 62] publicity bureau, I could probably say I think it was. I think up to January 25th it had probably been in existence a number of months, and it is entirely possible I might have been referred to Mr. O'Neil that many times by——

Q. By Mr. Bridges?

A. Perhaps.

Mr. Luddy: That is all.

Cross-examination.

By Mr. Katz:

Q. You say you might have been referred, but you are not sure you were referred. Is that correct?

A. I can only say this, that I know that at least once, and maybe a couple of times I would contact with Mr. Bridges with respect to some matter—for example, the A. F. of L. lumber boycott that was on, and if the C. I. O. was going to have anything to say about this, and perhaps, as I assume, Mr. Bridges had prepared a release which was to be issued through Mr. O'Neil and I was told that Mr. O'Neil had the release.

By the Court:

Q. By "release" you mean a newspaper story?

A. Yes, there statement of their official position in the matter.

By Mr. Katz:

Q. In the parlance of the newspaper world the C. I. O. [fol. 63] and Mr. Bridges are news?

A. Yes.

Q. And newspapers are constantly after his office for information. Is that correct?

A. That is right.

Q. And you say it is a routine matter, or a matter which has been going on a considerable period of time, for newspaper people to call the C. I. O. to attempt to get Mr. Bridges and the publicity department to ask about the C. I. O.'s position on an issue where the longshoremen are concerned?

A. That is correct. I had been doing it long before the C. I. O. was in existence.

Q. And you continued to after?

A. Yes.

Q. And what happened with respect to this story would you say was any different than what happened in respect to other stories in which the C. I. O. was involved?

A. You understand that I didn't cover this story that is at issue here.

Q. From your experience as a member of the Chronicle staff, and from what you know about this situation and other situations in which the C. I. O. was interested, would you say the same general pattern was followed?

A. I think so.

Mr. Katz: I think that is all.

[fol. 64] Redirect examination.

By Mr. Luddy:

Q. You have any recollection at the present time of previously having had a matter come up in which a telegram was sent to Mrs. Perkins, or anybody else criticizing the Court's opinion on a matter, or decision on a matter that was pending?

A. Not criticizing a court's decision, but I recall many times when telegrams were sent and released out here shortly after they were sent.

Q. By the C. I. O.?

A. For the longshoremen.

Q. Telegrams that Mr. Bridges had sent to Madam Perkins?

A. Yes.

Q. Relating to labor matters or specific labor controversies?

A. Relative to specific labor controversies.

Q. Who customarily released such telegrams?

A. Well, before the C. I. O. was formed, whenever there was trouble surrounding the unloading or loading of a ship and it was felt necessary to send a telegram to Madam Perkins, I believe that John Shoemacher was the publicity man then, and the release might come through him, or it might come from Schmidt, or one of the other officials, or might come from Mr. Bridges.

[fol. 65] Q. During the time you have been connected with the Chronicle and prior to January 24th, 1938, you recall a good many instances where telegrams were sent by Harry Bridges to Madam Perkins and were released through some publicity agent or some other source and given to the newspapers in San Francisco, do you?

A. I don't think I would confine it to Madam Perkins; it might have been to other Washington officials.

Q. But there were a good many instances you recall of telegrams that were sent to Madam Perkins or other officials in Washington in which, as a matter of routine the telegram would be released by an agent of the C. I. O. and get into the San Francisco newspapers. Is that right?

A. I can't, offhand, recall specific cases.

Q. I don't want you to do that.

A. But I will say this in explanation: If they were not released out here, they would hear from us, because we wouldn't want the story to break in Washington. We feel that it should be released up here.

Q. But you do at this time recall instances, without reference to any particular one; you do recall instances in the past when telegrams have been sent by Mr. Bridges to Madam Perkins, or other officials and were released by the agent of the C. I. O. and given to the San Francisco newspapers?

A. Yes, I recall one or two instances during the '36-'37 [fol. 66] strike and I believe—in this, I am not sure whether Mr. Bridges sent these, or not, but in the New Orleans trouble telegrams were sent to federal officials from city and state officials and they were released out here.

Q. You said something about the newspapers in San Francisco—perhaps I do not use your exact words, but I gathered they would be quite irritated if the telegrams were released in the east rather than released so that the San Francisco newspapers could get the first story.

A. We would feel, if it broke in the west, we should get the first break on it.

Q. Do you know of any understanding with the C. I. O. where the newspapers would get the first break on it?

Mr. Katz: That is unwritten law.

By Mr. Luddy:

Q. Mr. Katz suggests there was an unwritten law that the San Francisco papers were to get the first crack on it.

Mr. Katz: I couldn't resist mentioning the unwritten law.

A. No, I don't know of any unwritten law. I think it would simply work out that way if the telegrams were released in Washington and it was pretty good news, we would call up and say, "Why didn't we get a break on this?"

By Mr. Luddy:

Q. And so far as you know, did you always get a break on it? By "you", I mean the newspaper fraternity in San Francisco?

[fol. 67] Mr. Katz: We are going to object to that upon the ground it is incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I couldn't say whether we always did.

By Mr. Luddy:

Q. Would you say, from your experience there in San Francisco and your contact with Mr. Bridges, that it was the custom of Mr. Bridges to issue to the San Francisco newspapers, copies of all telegrams which he sent to Washington?

A. No, I couldn't say that that was true, because I don't know all the telegrams that he sent to Washington.

Mr. Luddy: I think that is all.
Mr. Katz: That is all.
Mr. Luddy: That is all.

[fol. 68] Tuesday, September 6, 1938: 2 o'clock P. M.

* * * * * * *

JAMES D. O'NEIL, called as a witness in behalf of the Plaintiffs, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: James D. O'Neil, O-'-N-e-i-l.

Direct examination.

By Mr. Luddy:

Q. Mr. O'Neil, you reside in San Francisco, do you?

A. Yes, sir.

Q. And in January of this year you were publicity agent—I think it is substantially admitted—in the C. I. O. in San Francisco, were you?

A. That is correct.

Q. How long have you been employed in that capacity with the C. I. O. in San Francisco?

A. Since the previous July.

Q. July, 1937?

A. That is correct.

Q. And your duties continued as such for how long?

A. Continued on until the following July.

Q. That is for a period of one year from July, '37, to [fol. 69] July, '38, you were the publicity agent?

A. Yes, sir.

Q. Did you have any assistant?

Mr. Ashburn: Pardon me just a moment. The witness nods he had, but did not answer the question.

By Mr. Luddy:

Q. Did you have any assistance in your work as publicity agent, or handled it largely yourself?

A. I handled it myself.

Q. Prior to the time that you were the publicity agent for the C. I. O., had you had some newspaper experience, yourself?

A. Some twenty years.

Q. And had a part of that, at least, been in San Francisco?

A. No, largely all over the country, Chicago and New York, Denver, St. Paul and cities scattered all over. Newspapermen wander about quite a bit, and I was like the rest.

Q. Had there been a publicity agent for the C. I. O. in San Francisco prior to the time that you took it over?

A. No.

Q. You established the office, or bureau, or whatever you might call it?

A. That is right.

Q. And what were your duties? Did you handle all of [fol. 70] the publicity that related to the activities of Mr. Bridges up and down the west coast, and elsewhere throughout the United States?

A. When I handled the publicity for the west coast and regional offices, naturally any publicity that broke about Mr. Bridges would originate in the city where the news was made.

Q. As being a news matter, Mr. Bridges was the dominating figure in the C. I. O. at all times?

A. Yes.

Q. It is as a matter of fact, is it not, that Mr. Bridges has been a dominating figure in the C. I. O. throughout the United States?

A. He is news, wherever he goes.

Q. And any statement that Mr. Bridges makes is considered by the newspapers as being newsworthy, is it not?

A. It is.

Q. Was it your duty to keep before the public the activities of Mr. Bridges, and the activities of the C. I. O. during the period of time you were acting as publicity agent for the C. I. O.?

A. Yes, sir.

Q. And I take it that it was your business to get as favorable publicity and prompt publicity as you might—as you legitimately might?

[fol. 71] A. The idea was to get the correct facts before the public, which we could not do without a publicity department. It was impossible to get the side of labor before the public.

Q. And during that time I take it Mr. Bridges had occasion to send and receive a large number of telegrams?

A. He did.

Q. And is it a matter of fact that letters would come to Mr. Bridges from all over the world relating to the business, and some requiring publicity? Is that right?

A. That is right.

Q. And who took care of the matter of handling publicity of telegrams that might be released, either that Mr. Bridges received, or that Mr. Bridges dispatched?

A. Giving publicity to the telegrams?

Q. Yes.

A. I did.

Q. In what fashion would a copy of a telegram which Mr. Bridges had sent to—say, to Madam Perkins, be handled?

A. A copy would be placed on my desk, and it might come in the course of the regular mail, or be brought down by receptionist, for me, be passed on as I saw fit.

Q. Did you have an office?

A. Yes, sir.

Q. Where?

[fol. 72] A. Three doors down from the reception room of the C. I. O. and four doors from Mr. Bridges' office.

Q. Would you say the number of copies of telegrams which Mr. Bridges would send out over the period of time that you were publicity agent, and particularly prior to on or about January 24, 1938, was large in number?

A. Yes, sir; quite a number of telegrams on various matters.

Q. How often would matters come from Mr. Bridges' office down to your desk for attention?

A. Maybe once a day, or three or four times a day, depending upon what the mail brought in.

Q. And so far as you know, might all the telegrams Mr. Bridges dispatched to public officials, or copies of all of them, come to your desk?

A. I wouldn't say I got copies of all of them, but copies that had anything to do with the C. I. O., most of them came to my desk.

Q. In other words, the telegram which would come to your desk might be a telegram which Mr. Bridges might consider newsworthy and leave it for your consideration?

A. Not necessarily he would consider it newsworthy; I got telegrams, or copies of telegrams in connection with current events and the C. I. O. By that, I want to make it clear that I didn't get copies of any personal telegrams he [fol. 73] dispatched, or copies on union business, I don't get copies of those.

Q. Why would the copies come to your desk, Mr. O'Neil?

A. Because all the publicity for all of the C. I. O. was cleared through my office.

Q. Who determined as to whether any telegrams came to your desk might be newsworthy and susceptible of being sent to the press for publication?

A. I did.

Q. And for how long a period of time had you been making decisions on those matters?—Prior to January 24, 1938?

A. I have been making them since the day I went to work there.

Q. And did the matters which came to your desk from Mr. Bridges' office and which you caused to be sent to the newspapers, did they appear from time to time in the newspapers in San Francisco?

A. They did.

Q. And did they appear in newspapers outside of San Francisco, to your knowledge?

A. I wouldn't know about that.

Q. I take it, you having been a newspaper man for many years, are familiar with the fact that all members of the Associated Press are obliged to give the Associated Press the benefit of any news items which the Associated Press [fol. 74] thinks newsworthy?

A. That is a part of the agreement.

Q. You knew that to be a fact in 1938?

A. Yes, sir.

Q. And in the past, on or about January 24, 1938, had there been frequent occasions when news items which you released to the San Francisco papers were, to your knowledge, taken up by the Associated Press and sent out on a wire up and down the coast and throughout the country?

A. Yes, sir.

Q. Would you say that frequently happened?

A. Quite often.

Q. And in addition to the Associated Press, the National News and the United Press also picked up stories which appeared in the San Francisco papers relating to the activities of Mr. Bridges and put them out on their respective news services, did they not, to your knowledge?

A. I believe they did.

Q. I don't suppose you could estimate, could you, how many news items over a period of six months prior to January 24, 1938, which you released to San Francisco papers were picked up by the news gathering associations and sent to members throughout the coast, and throughout the United States?

A. There would be no way of determining that.

[fol. 75] Q. Several hundred, would you say?

A. I couldn't even give a guess offhand. It is impossible to even give a guess how many were carried on wires.

Q. Would you say it would be at least a hundred that would get on the wires and appear up and down the coast?

A. I wouldn't even give a guess on it. I have no idea, I said, how many were carried on the wires, and how much appeared in local papers.

Q. But there were cases when what you issued to the San Francisco papers appeared up and down the coast and throughout the United States?

A. Yes.

Q. Did Mr. Bridges ever criticize you, or tell you you had not exercised good judgment in respect to matters that you released to the San Francisco papers?

A. I don't recall that he ever did.

Q. At no time during the time that you were publicity agent there?

A. No, we never had any difficulty.

Q. You heard the testimony of Mr. Resner of the Chronicle given here in court today?

A. I did.

Q. You are the Mr. O'Neil he referred to as being the man he called on the 'phone that night?

[fol. 76] A. I am.

Q. Now, I think it appears without dispute that the first story of the telegram Mr. Bridges sent to Madam Perkins broke in the afternoon edition of the San Francisco News. Do you recall the fact that the story did break in the San Francisco News?

A. Yes.

Q. Do you know who gave the News, and by the "The News", I mean the San Francisco News issue of January 24th, which is Petitioner's Exhibit 1; who gave the News the information upon which the story was based which appeared upon the exhibit?

A. I did.

Q. And you gave it so that the afternoon paper might get a break on the story. Is that it?

A. No, I didn't give any paper a break. The telegram came over my desk and when it did, if I am not mistaken, I called the News, because the News was going to press at that time. You see, the News is the only afternoon paper we give news up there.

Q. And the News is the only afternoon paper to which you give news?

A. That is right. The other paper is a Hearst paper, and we have an absolute boycott on the Hearst papers; we can't give them anything.

[fol. 77] Q. And did you call up the San Francisco News immediately upon a copy of this telegram coming over your desk?

A. I believe I did.

Q. You read the telegram?

A. Yes, sir.

Q. Did it appear to you to be newsworthy?

A. When a man wires a Cabinet Member of the President it is news in any man's language, so——

Q. (Interrupting:) So you immediately called up to let them have it?

A. That is correct.

Q. And later the same day Mr. Resner of the Chronicle called you, did he not?

A. I believe he did.

Q. And I think he stated in his testimony he asked you for a little more detail and you read to him over the telephone a telegram. Is that right?

A. Yes, sir.

Mr. Ashburn: The witness nods his head.

A. Yes.

By Mr. Luddy:

Q. And is it a fact that the purported extracts from the telegram to Madam Perkins are true and correct extracts?

A. I wouldn't want to say that unless I had an official [fol. 78] copy of the telegram, itself. It is a long way back—eight months—the telegram, itself, and it was filed.

Mr. Luddy: I think it is admitted in the pleadings, and I think there is no dispute on that, Mr. O'Neil.

Mr. Wirin: No.

A. Then, it is all right.

Mr. Luddy: That is all.

Cross examination.

By Mr. Katz:

Q. Mr. O'Neil, did you receive any direction from Mr. Bridges to deliver that telegram to any of the newspapers?

[fol. 102] lack is shown, goes not to the intent, but to the mitigation of the punishment.

The Court: Overruled.

A. At that time, so far as I was concerned, I was not giving a thought to Judge Schmidt. The way I looked at the situation, the decision had been made in court and the receiver was to go into effect immediately and the situation seemed to be dangerous, and that is all I was concerned with, and I wasn't thinking of Judge Schmidt.

Q. Now, it is charged here in the papers, in substance and effect, that you sent the telegram to Frances Perkins which is set forth in the papers, as a device to warn Judge Schmidt as to what he was to do. Did you send such telegram with such a purpose and intent?

Mr. Luddy: I submit that that is not in evidence, nor in the pleadings.

The Court: So far as the question is concerned, it has already been asked and answered, I think.

By Mr. Katz:

Q. Did you have any intention at the time you sent the telegram of bringing a telegram or the contents thereof to the attention of Judge Schmidt?

Mr. Luddy: I object to that upon the ground that there is no necessity that he have any specific intent. The Court has already ruled that the telegram has been brought to the attention of Judge Schmidt.

The Court: Overruled.

[fol. 103] A. No, to the best of my recollection at this time I was having a little difficulty through long distance 'phone calls in getting the exact picture of the situation down here. I was trying to get exactly what had been done. I received one report that the order didn't become effective for a month, and I received conflicting reports, and the way I looked at it that the order would go into effect at the time stated, although I can remember I couldn't get a definite date as to when the order would go into effect, and all I was concerned with so far as I was concerned, the thing was already going to happen and I looked ahead and seen where trouble was going to occur and I wasn't thinking of influencing Judge Schmidt, or anything along that line. The other matters seemed to me much more important.

Q. I understand that you sent telegrams to other agencies which you considered affected by that decision?

A. Yes, the maritime commission — for example, the United States Maritime Commission is now in the process of taking over all of the ships. They are, in effect, the legal owners, and likewise certain actions can occur on those ships which can make the men liable to take action subject to punishment, so the substance of the telegram— just a couple of months before that, Mr. Joseph Kennedy, who is the present ambassador to Great Britain was then president of the Maritime Commission and he was then up in Seattle and we were settling a strike up there. The port [fol. 104] had been tied up for three weeks and the last thing I knew Mr. Kennedy said was, "When anything is coming up out here, let me know before it happens from now on." So I wired Joseph Kennedy and he wired back and said, "We have no jurisdiction."

Q. And as I understand it, that telegram is substantially the same as the telegram to Mrs. Perkins?

A. Yes, I would say so. The telegram is substantially the same.

Q. When you spoke to Resner, did you think that Resner was going to make a copy of that telegram and put it on the spike for Associated Press release?

A. No. I know generally the set-up of newspapers and their wire services, but I never gave it a thought at that time.

Q. Did you tell him, or give his instructions about getting it printed anywhere other than San Francisco?

A. No.

Q. Now, you knew that Resner was connected only with the San Francisco newspaper. Is that right?

A. The Chronicle.

Q. Did you, yourself, do anything at all with that telegram about sending it to Judge Schmidt, or mailing it to him, or anything of that kind?

Mr. Luddy: That is objected to upon the ground that it is entirely immaterial and outside of the issues in this case. [fol. 105] The Court: Sustained.

By Mr. Katz:

Q. I understood you to say that telegrams go to the desk of Mr. O'Neil so that he may be advised of what is going on in the C. I. O.?

A. At all times.

Q. And did you consider this to be one of those telegrams that he might know what was going on?

Mr. Luddy: Now, I submit that counsel is merely repeating and going over the ground Mr. Wirin has.

The Court: Yes, but he may answer.

A. To the best of my recollection I never gave it any thought in that way. The determination of the publicity end of it was left up to Mr. O'Neil, and I can't recollect doing anything in relation to that specific telegram.

By the Court:

Q. When you dictated this telegram to your secretary, that was your end?

A. So far as I was concerned.

Q. You knew she was going to send the telegram and give Mr. O'Neil a copy?

A. Yes, sir.

By Mr. Katz:

Q. In dictating that telegram and sending it to the person to whom you sent it, did you think you were following the usage and practice which had grown up in the past with respect to the sending of telegrams?

Mr. Luddy: That is objected to upon the ground that it [fol. 106] is the publishing of the telegram that is in issue.

The Court: He may answer it.

A. I have already answered it more or less. We have a working arrangement with the United States Government along those lines. We are criticized enough for it, but it is there and as I say there is no compulsion to it and we, at all times, keep them informed, and various government agencies and government officials, and I would say that practically every day, so far as our own set-up is concerned and the C. I. O. set-up, numerous telegrams go out to some agency or other of the government, or officials of the government.

Mr. Katz: Cross examine.

The Court: Tomorrow morning at 10 o'clock.

(Whereupon an adjournment was taken until 10 o'clock a. m. on the following day, Tuesday, September 13, 1938.)

[fol. 107] Tuesday, September 13, 1938; 10 o'clock A. M.

HARRY R. BRIDGES resumed the stand:

The Court: Had you notified the Department of Labor by telegram or otherwise, that the case—I am referring now prior to the telegram of January 24th—that the matter just referred to in the stipulation was up before the National Labor Relations Board; that is to say, was to be?

A. Yes, they were always notified.

The Court: So that the statement to that effect in the telegram was just reiterating a fact which they already had before them?

A. Yes, I had notified them in the early part of the year. I was in Washington, D. C. and I personally notified them then.

Mr. Luddy: May we proceed, your Honor?

The Court: Yes. No further questions.

Mr. Wirin: Well, I had a few questions I would like to conclude with.

The Court: Well, if it is a part of your direct, or redirect.

[fol. 108] Direct examination (resumed).

By Mr. Katz:

Q. Well now, Mr. Bridges, in the past, have you ever had a real call to press conferences?

A. Yes, sir.

Q. And generally what were the occasions and why were the press conferences held?

Mr. Luddy: That is objected to as not being material to any of the issues in this case, and having nothing to do with the circumstances surrounding the sending of the telegram.

The Court: Well, you cannot be too strict. Answer the question. Objection overruled.

A. On various occasions we held press conferences; on the arrival of national figures in the city for the purpose of interviewing them; on emergency situations—serious situations, and so forth. In that case why, we called press conferences with the various newspapers.

By Mr. Katz:

Q. In connection with this telegram did you ever ask O'Neil to call a press conference?

A. No.

Q. What was the basic purpose for a press conference?

Mr. Luddy: That is objected to upon the ground it is calling for a conclusion of the witness and has already been asked and answered as to what the purpose was.

[fol. 109] The Court: My stupidity. I suppose by press conferences, they were between Mr. O'Neil and the other officials. It is obvious to me now that he called in reporters.

Mr. Wirin: In other words, it was a conference with the press.

The Court: Yes. As I say, in my stupidity I missed that point. I have it now. Do you want to have him tell what everybody knows, what the purpose of a press conference is?

Mr. Katz: No.

The Court: All right.

By Mr. Katz:

Q. Now, Mr. Bridges, in answering a question put to you on direct examination once, you said that on January 24, 1938, you had no information at all concerning the pendency of a motion for a new trial, or the pendency of a motion to vacate the order appointing the receiver. In answer to a subsequent question you made reference to—you said that you understood first, that there was a 30 day stay and that wouldn't go into effect for seven days. Will you explain the answer, please?

A. Well, I meant by that, as I recall, that order was handed down on a Friday and I don't think I heard about it until a Saturday afternoon, but Monday I still never had a clear official report of exactly what was taking place. I had conflicting reports and I didn't know anything about an order for a new trial, and I didn't know anything that [fol. 110] I recall about an order to vacate the receivership. I wasn't entirely—I never had any definite information as to the state of the receivership.

Q. Were you of the opinion, so far as Judge Schmidt was concerned, that that matter was finished by the judgment?

Mr. Luddy: That is objected to upon the ground that it is calling for a conclusion of the witness. Certainly the witness is presumed to know what the law is.

The Court: He may answer.

A. I am not acquainted with all of the technicalities of law and my distinct thought at that time was that we were through with the court and there was no further decision to be made by the Court. The case had been going for two or three months at that time, and I thought that decision was final, and that is definitely the way we looked at it.

Mr. Katz: Cross-examine.

Cross-examination.

By Mr. Luddy:

Q. Mr. Bridges, you have been the president of the International Longshoremen and Warehousemen Union for how many years?

A. Well, that is a new one, when we affiliated with the C. I. O.?

Q. Yes, I understand so. Now, how many years?

[fol. 111] A. Since August, 1937.

Q. And you have been a west coast director of the C. I. O. for how many years?

A. Since July, '37.

Q. And you have been district president of the Longshoremen and Warehousemen Union now, how long?

A. Since June, 1936.

Q. Now, prior to your affiliation with the particular labor groups I have just asked you about, had you been connected as an officer with any other labor organization on the west coast?

A. Well, I had been the local president of the Longshoremen in San Francisco since 1934, and connected in a minor official capacity prior to that time.

Q. And during the time that you have been connected with these various labor organizations, had there been lawsuits in which the organization with which you were connected were either plaintiff or defendant?

A. No.

Q. None, at any time?

A. No, not that I can recall. As to the best of my knowledge there never was any; never troubled with them until this particular case.

Q. And during the time that you have been active in labor organizations you have had frequent contact with [fol. 112] newspaper reporters, have you not?

A. That is correct.

Q. In all parts of the country?

A. I have.

Q. And your contacts were so frequent with the members of the press that finally a publicity bureau was established in San Francisco in connection with your organization, was it not?

A. That wasn't entirely the reason.

Q. No, but that had something to do with the organization of the publicity bureau, the fact that contacts with the press were frequent and deemed desirable. Is that right?

A. Well, so far as the publicity bureau was concerned, the press statements were only a small part of their work.

Q. You had been interviewed by newspaper reporters for many years prior to 1938, had you not?

A. Well, I would say four years—three years.

Q. Well, taking the last two years prior to that date, interviews with newspaper reporters were rather a frequent occurrence in your life, were they not?

A. They were not.

Q. Perhaps I am mistaken as to the word "frequent," but certainly you had more interviews with the newspaper reporters than the average individual not in the public eye, did you not?

[fol. 113] A. That is correct, yes.

Q. And the statements which you had given to newspaper reporters in San Francisco, to your knowledge, appeared as news items in other sections of the United States?

A. Yes, that is correct.

Q. Did the C. I. O. or any of the organizations to which you were connected for the past few years, or yourself, have any subscription to any clipping bureaus, or anything of that sort?

A. No.

Mr. Luddy: That is all, Mr. Bridges.

The Court: Proceed.

Mr. Katz: Does your Honor care to ask a question?

The Court: No.

Redirect examination.

By Mr. Katz:

Q. Mr. Bridges, you said in answer to a question by Mr. Luddy that in so far as the publicity department is con-

cerned, the press releases were only a part of their work. Will you tell us what the balance was?

Mr. Luddy: That is objected to upon the ground that it is not proper redirect examination and has been fully covered on direct examination.

The Court: I don't see what the relevancy is.

[fol. 114] Mr. Katz: Has the Court ruled?

The Court: Sustained.

By Mr. Katz:

Q. You referred to press conferences on direct examination. Will you tell the Court why it was that you had O'Neil arrange press conferences from time to time?

Mr. Luddy: I object to that upon the ground that it is not proper redirect examination.

The Court: It isn't proper.

Mr. Katz: The question is, why?

The Court: If you do something to impress it upon them, you impress it upon them.

Mr. Katz: That is correct.

The Court: And if you weren't interested, you would just send it out in the ordinary routine.

By Mr. Katz:

Q. Is the statement by the Court correct?

A. Substantially correct in question—that is correct.

Mr. Katz: That is our case.

Mr. Luddy: We have no rebuttal.

The Court: Are you ready to argue it?

Mr. Luddy: I think so, your Honor.

[fol. 115] REPORTER'S CERTIFICATE

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, CLYDE W. SMITH, an Official Reporter of the Superior Court of the State of California, in and for the County of Los Angeles do hereby certify that the foregoing pages comprise a full, true and correct transcript of the testimony of the witnesses Brian Bell, Lawrence Resner, Arthur Eggleston and Harry R. Bridges in the case of P. W. Walker, et al., Plaintiffs, vs. International Longshoremen's

Association Local 38-82 Inc., et al., Defendants, Superior Court No. 420356.

Dated this 17th day of November, 1938.

Clyde W. Smith, Official Reporter.

[fol. 116] IN SUPREME COURT OF CALIFORNIA

IN BANK

S. F. No. 16174

BRIDGES

vs.

SUPERIOR COURT, LOS ANGELES COUNTY

ORDER DENYING PETITION FOR WRIT OF REVIEW—
Filed December 1, 1938

By the Court:

The petition for a writ of review herein, is denied.

Dated: December 1, 1938.

(Sig.) Seawell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 117] IN SUPREME COURT OF CALIFORNIA
IN BANK

[Title omitted]

ORDER VACATING JUDGMENT, ETC.—Filed December 30, 1938

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside.

Let a writ of review issue in the above entitled matter, returnable before this court in bank, at its courtroom in

the City of Los Angeles, on March 7th, 1939, at ten o'clock a. m.

Dated: December 29, 1938

Signed: Seawell, Acting Chief Justice. Shenk, Justice. Curtis, Justice. Langdon, J., Justice. Edmonds, Justice.

[File endorsement omitted.]

[fol. 118] [File endorsement omitted.]

[fol. 119] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

STIPULATION AMENDING REPORTER'S TRANSCRIPT, ETC.—Filed March 7, 1939

It is hereby stipulated, by and between the parties to the above entitled action, acting through their duly authorized attorneys of record herein, that subject to the approval of this Court, an order may be entered upon presentation of this stipulation, amending the Reporter's Transcript of a portion of the proceedings had in the lower Court, filed herein and by reference incorporated in the petition for writ of review, so as to add to and make a part of said Partial Transcript the photostats attached hereto marked respectively "Pro. Ex. 1" and "Pro. Ex. 2";

And it is further stipulated that the newspaper article, of which Exhibit "Pro. Ex. 2" is a photostatic copy, is the article referred to in said Transcript as having been placed upon the wires of the Associated Press during the evening of January 23, 1938, at San Francisco and transmitted to the Associated Press member papers in Los Angeles, and

[fol. 120] by them published in their morning and afternoon editions on January 24 and January 25, 1938.

Dated this 6th day of March, 1939.

Gallagher, Wirin & Johnson; Gladstein, Grossman & Margolis; and Charles J. Katz. By A. L. Wirin, Attorneys for Petitioner.

J. H. O'Connor, County Counsel; Douglas De Coster, Chief Deputy County Counsel; S. V. O. Prichard, Deputy County Counsel, Allen W. Ashburn, Michael G. Luddy and Arnold Praeger. By Michael G. Luddy, Attorneys for Respondent.

Order

It is ordered

Dated: March —, 1939.

—— ——, Chief Justice.

[fol. 121] Pro. Exhibit 1

I. L. A. Files Suit on I. L. W. U. Over Work

The revived International Longshoremen's Association, affiliated with the American Federation of Labor, filed a suit in Superior Court today seeking to compel the International Longshoremen & Warehousemen's Union to put its men to work on the waterfront.

Harry Bridges, Coast head of the C. I. O. and longshoremen, wired Secy. of Labor Frances Perkins at the same time that the port of Los Angeles will be tied up and the entire Pacific Coast involved if an attempt is made to enforce a Los Angeles Superior Court order putting a receiver in charge of the San Pedro Longshoremen's Union.

The I. L. A., Local 38-39, through Lawrence Mallen, president; James F. Kennedy, secretary, and eight others charged the Committee for Industrial Organization had illegally seized control of longshoremen and the waterfront agreements.

An injunction was asked to prevent I. L. W. U. from attempting to exercise the sole right of dispatching stevedores.

Superior Judge Louis H. Ward, remarking that he "realized the need of quick action in this suit," set a hearing for 10. a. m. tomorrow on whether a temporary restraining order should be issued. He set Feb. 26 as trial date on the request for a permanent injunction.

[fol. 122] PEO. EXHIBIT 2

Bridges Says Court Action Means Tieup

Secretary Perkins Gets Warning L. A. Edict May Close Coast Ports

A new Pacific Coast water front tieup is threatened, Secretary of Labor Perkins was advised yesterday in a telegram sent from here by Harry Bridges, president of the Pacific Coast Longshoremen, and West Coast C. I. O. director.

Immediate reason for the threatened tieup is the receivership established last week in Los Angeles on the order of Judge Reuben Schmidt over the funds and possessions of San Pedro longshoremen, Bridges said.

Effective Saturday

Judge Schmidt named Will Hays the receiver, made the receivership effective this coming Saturday, on an action brought in the name of the International Longshoremen's Association, Local 38-82.

Local 38-82, formed by a nucleus of longshoremen opposed to the C. I. O., took up the charter abandoned by San Pedro longshoremen when they voted to join with the International Longshoremen's and Warehousemen's Association, and then affiliate with the C. I. O.

The reorganized A. F. L. union of longshoremen claimed the rights retained by the I. L. W. U. longshoremen's unit when C. I. O. affiliation was effected.

Decision Hit

Bridges' telegram referred to Judge Schmidt's decision, and read: "This decision is outrageous, considering I. L. A. has 15 members and I. L. W. U. 2000. I. L. W. U. has pe-

titioned N. L. R. B. for certification representing San Pedro longshoremen, with I. L. A. denied intervention by board because they represent only 15 men."

Bridges referred to a N. L. R. B. hearing concluded January 6 in Los Angeles, when I. L. A. unit was refused the board's permission to act as an interested party, Bridges said.

The telegram to Secretary Perkins continued: "Attempted enforcement Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. I. L. W. U., representing over 11,000 of the 12,000 longshoremen on Pacific Coast does not intend to allow State courts to overrule majority vote of the membership in choosing its officers and representatives and to override N. L. R. B."

The only available spokesman for Pacific Coast water front employers, Gregory Harrison, attorney, said it is the position of the employers, repeated time and again, not to take " a part in interunion affairs."

Mass Meeting Due

Bridges said he intended to leave here for San Pedro, where members of the C. I. O. local intend to hold a mass protest meeting Wednesday or Thursday.

In further explanation of his telegram, the longshoremen's president said: "Judge Schmidt has actually ruled that the port of Los Angeles will be tied up. This means the automatic tieup of all other ports on the Coast.

"The court has ruled that 12 men own the contracts. Well, then, let the 12 men load the ships. The court is trying to force the longshoremen to join the I. L. A., and the men aren't going to do it."

"If the courts can decide this, it also means that the courts can rule on whether or not we have the right to strike. It means that any two or three men can protest any economic action decided upon by the majority of the membership of the union.

"We may as well understand where we stand. If they can get away with this, it means the end of unions on the Pacific Coast. There won't be anything but company unions," Bridges said.

Labor Board Petition

In another phase of the same dispute, the I. L. W. U. district and locals last week filed a petition for certification as

the bargaining agent for Pacific Coast longshoremen with the National Labor Relations Board.

The C. I. O. longshoremen seek certification on a Coastwise basis, or if not a coastwise, on a regional basis. Regions named in the petition are Los Angeles, San Francisco, Portland and Seattle.

Locally, the longshoremen have asked the Waterfront Employers' Association of San Francisco to give formal recognition to the C. I. O.'s rights under the existing contract, it was learned.

A new suit also was filed here yesterday by the reorganized A. F. L. local, I. L. A. 38-39, to obtain the rights and possession now held by the I. L. W. U., Local 1-10.

Court Order Issued

The suit, signed by Lawrence Mallen, and ten members of the I. L. A. 38-79, is similar in many respects to one filed several months ago by the Tacoma unit of longshoremen against the C. I. O. organization.

Superior Judge Goodell issued an order for the defendants, Bridges and Henry Schmidt, and other I. L. W. U. officials, to appear in court tomorrow and show cause why an injunction should not be issued in favor of Mallen and his associates.

Mallen's compiaint, drawn up for him by Aaron Sapiro, attorney, cites the refusal by the I. L. W. U. to dispatch his men through the I. L. W. U. hiring hall, alleges illegal seizure of property, books and funds, and asks the right to operate under the existing water front contracts.

[fol. 123] [File endorsement omitted]

[fol. 124] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

STIPULATION AS TO RETURN BY RESPONDENT TO, AND RECORD UPON, WRIT OF REVIEW—Filed March 7, 1939

It is Hereby Stipulated, by and between the parties to the above entitled action, acting through their duly authorized attorneys of record herein, that the return of the respondent,

directed by writ of review heretofore issued in this matter, and the record upon review herein, shall consist of the following:

(1) The transcript of a portion of the proceedings had in the respondent Court, as amended by addition of two exhibits, pursuant to stipulation this day made and filed, which said transcript was heretofore filed herein, and by reference incorporated in the petition for writ of review herein;

(2) The affidavit of J. Louis Elkins filed in the lower Court in these proceedings therein, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 1-14 inclusive of Exhibit [fol. 125] "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(3) The affidavit of L. E. Lampton filed in the lower Court in these proceedings therein, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 15-19 inclusive of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(4) Permanent injunction issued in the case of P. W. Walker, et al., v. International Longshoremen's Association, Local 38-82, et al., in action No. 420356 in the records and files of the respondent Court, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 20-23 inclusive of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(5) Findings of fact and conclusions of law filed in the case of P. W. Walker, et al., v. International Longshoremen's Association, Local 38-82, et al., in action No. 420356 in the records and files of the respondent Court, true and [fol. 126] correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 24-47 inclusive of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be con-

sidered in all respects as though a certified copy thereof were filed herein as a part of this record;

(6) Affidavit of Charles E. Sharritt filed in the lower Court in these proceedings therein, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 48-56 inclusive of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(7) Affidavit of A. G. Stanham filed in the lower Court in these proceedings therein, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 57 and 58 of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(8) Affidavit of H. R. Bridges filed in support of motion to vacate order appointing receiver in the case of P. W. Walker, et al., v. International Longshoremen's Association, Local 38-82, et al., in action No. 420356 in the records [fol. 127] and files of the respondent Court, true and correct copy of which is attached to and made a part of the petition for writ of review herein, being pages 59-73 inclusive of Exhibit "A" of said petition, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(9) Order to show cause issued by respondent Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "B", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(10) Motion to quash order to show cause filed in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "C", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be con-

sidered in all respects as though a certified copy thereof were filed herein as a part of this record;

(11) Demurrer to order to show cause filed in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "D", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be con-
[fol. 128] sidered in all respects as though a certified copy thereof were filed herein as a part of this record;

(12) Opinion and order of Hon. Edward T. Bishop, a judge of respondent Court, filed and entered in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "E", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(13) Answer of H. R. Bridges, sometimes known as Harry R. Bridges, filed in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "F", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(14) Demand for jury trial filed in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "G", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(15) Transcript of proceedings had in the lower Court [fol. 129] in these proceedings therein, had on Tuesday, September 13, 1938, true and correct copy of which is attached to, marked Exhibit "H", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(16) Judgment of respondent Court, filed and entered in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "I",

and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(17) Notice of motions to dismiss, to vacate judgment and for a new trial, filed in the lower Court in these proceedings therein, true and correct copy of which is attached to, marked Exhibit "J", and made a part of, the petition for writ of review herein, which said copy is by reference incorporated herein and shall be considered in all respects as though a certified copy thereof were filed herein as a part of this record;

(18) Orders extending stay filed and entered in the lower Court in these proceedings therein, true and correct copies of which are attached to, marked Exhibits "K" and "L", and made a part of, the petition for writ of review [fol. 130] herein, which said copies are by reference incorporated herein and shall be considered in all respects as though certified copies thereof were filed herein as a part of this record;

(19) The stipulations this day filed herein, relating to the exhibit "Pro. Ex. 2", and the transmittal of the article, of which said exhibit is a photostatic copy, to the Los Angeles newspapers, members of the Associated Press, and the publication of said article by said member papers in Los Angeles on January 24 and January 25, 1938;

And it is Further Stipulated that the foregoing stipulations, records, files and proceedings, and all matters therein referred to, constitute for the purposes of the above entitled proceedings a complete and correct record of the proceedings had and taken in the Court whose order is herein under review, and the review of said order may be taken, heard and determined upon said record.

Dated this 6th day of March, 1939.

Gallagher, Wirin & Johnson; Gladstein, Grossman & Margolis; and Charles J. Katz, by A. L. Wirin, Attorneys for Petitioner.

J. H. O'Connor, County Counsel; Douglas De Coster, Chief Deputy County Counsel; S. V. O. Prichard, Deputy County Counsel; Allen W. Ashburn; Michael G. Luddy; and Arnold Praeger, by Michael G. Luddy, Attorneys for Respondent.

* * * * * * *

[fols. 131-132] IN SUPREME COURT OF CALIFORNIA

S. F. No. 16174. In Bank. October 16, 1939

HARRY R. BRIDGES, Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

[fol. 133] Application for a writ of certiorari to review a judgment of the Superior Court of Los Angeles County, Ruben S. Schmidt, Judge, adjudging petitioner guilty of contempt. Judgment affirmed. Edmonds, J., dissents.

For Petitioner—Gallagher, Wirin & Johnson; Gladstein, Grossman & Margolis; Charles J. Katz, A. L. Wirin.

For Respondent—J. H. O'Connor, County Counsel; Douglas De Coster, Chief Deputy County Counsel; S. V. O. Prichard, Deputy County Counsel; Allen W. Ashburn, Michael G. Luddy, Arnold Praeger.

OPINION

This proceeding was instituted for the purpose of reviewing a judgment of the Superior Court of the County of Los Angeles whereby the petitioner, Harry R. Bridges, was found guilty of contempt of court. Upon the filing of the petition herein, an order was made that the proceedings before the trial court be certified to this court in order that the same might be reviewed and such action taken therein as is by law required. The basis of the contempt proceeding was the alleged publication of a portion of a telegram sent by petitioner to the secretary of labor which, it is claimed, contained statements calculated to, and which had an inherent tendency to, interfere with the proceedings of a certain action then pending before the Honorable Ruben S. Schmidt, a judge of the Superior Court of said County of Los Angeles. That action was entitled P. W. Walker et [fol. 134] al., v. International Longshoremen's Association, District Local 38-82, Inc. et al. and carried the number 420356.

The proceedings against petitioner involving said charge of contempt were commenced by the filing of four affidavits, each entitled, "In the Matter of H. R. Bridges, sometimes known as Harry R. Bridges. In Contempt", and were

verified respectively by J. Louis Elkins, executive secretary of the Los Angeles Bar Association; L. E. Lampton, clerk of the Superior Court of the County of Los Angeles; Charles E. Sharritt, and A. G. Stanham, deputy county clerks of said court. After proceedings duly had, the petitioner appeared in said court, filed an answer to the charge made against him in said affidavits and the matter was heard by the Honorable Edward T. Bishop, a judge of said superior court. At the close of said hearing, the petitioner herein was found guilty of contempt of court upon the second count set forth in the affidavit of J. Louis Elkins, and not guilty as charged in the third count of said affidavit. The trial court had theretofore sustained a demurrer of petitioner to the charge as set forth in the first count of said affidavit. In adjudging the petitioner herein guilty of contempt of court, the trial court made findings of fact which we set out in full as follows:

"That on or about the 18th day of September, 1937, an action was commenced in the above entitled court by the filing of a complaint and the issuance of a summons entitled, 'P. W. Walker et al., plaintiffs, v. International Longshoremen's Association—Local 38-82, Inc., a corporation et al., defendants', which said action is known as action number 420356 in said court.

"That said action was tried in the above entitled court before the Honorable Ruben S. Schmidt, as judge thereof, and on the 21st day of January, 1938, the said Ruben S. Schmidt, as judge of said court, made, signed and filed his findings of fact and conclusions of law in said action.

"That thereafter, but on the same day, a judgment and permanent injunction in said action were made and filed, in and by the terms of which a receiver was appointed over said International Longshoremen's Association, Local 38-82, Inc., and said receiver on said date qualified by filing a bond required by said judgment to be filed by him, and by making and filing his oath as such receiver.

"That on the next day, to-wit, the 22nd day of January, an order was made and entered by the court, staying the execution of said judgment and said injunction to the 29th day of January, 1938; that said judgment and permanent injunction were entered by the clerk of this court, on the 24th day of January, 1938, in the judgment book kept by him for that purpose, and that on said date all the defend-

ants in said action, against whom judgment had been rendered and said permanent injunction issued, made and served a notice of intention to move for a new trial and a notice of motion to vacate the judgment and decision in said action.

"That from the time of the filing of said action, to and including the time of the events hereinafter referred to, the existence of said action and of the controversy involved therein received wide and general publicity in the Pacific Coast states of the United States of America. That almost daily during said period news items respecting the controversy involved in said action, and respecting conditions in the maritime industry on the Pacific Coast as a result of said controversy, appeared in the daily newspapers published and circulated in the City of Los Angeles, and that the [fol. 135] existence of said controversy and of the fact that the said controversy was pending in the courts for determination was a matter of great public interest and general public discussion.

"That on the 24th day of January, 1938, the defendant Harry R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States, at Washington, D. C., which telegram contained words and figures as follows, to-wit: 'This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending; Attempted enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board.' That the words 'this decision' and the words, 'Schmidt decision', as used in the telegram, referred to the judgment and permanent injunction in which was contained an order appointing a receiver, as hereinabove noted. That the initials 'I. L. A.' referred to in said telegram, referred to International Long-

shoremen's Association, Local 38-82, Inc., hereinabove referred to.

"That at or about the time of the sending of said telegram the defendant Harry R. Bridges caused a copy thereto to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and would be, furnished to and published in newspapers on the Pacific Coast and elsewhere, and said James D. O'Neil did give said telegram to newspaper reporters, and on the 24th and 25th days of January, 1938, the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, in the State of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere.

"That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending."

As we view the proceedings before us, it involves three major questions which call for answers. There are also questions of minor importance which will be discussed briefly at the close of this opinion. These three questions are: first, one of procedure, second, the constitutionality of the last sentence of subdivision 13 of section 1209 of the Code of Civil Procedure, and third, whether the petitioner was responsible for the publication of the telegram sent to the secretary of labor, or that portion thereof which found its way into the public press, and if so, was the subject-matter thereof of such a character that the publica-[fol. 136] tion thereof would subject the petitioner to punishment for contempt of court?

At the inception of the proceeding against petitioner, he objected to the procedure by means of which he was brought before the court and prosecuted on the charge of which he was subsequently found guilty. As we have seen, this proceeding was initiated by the filing of four affidavits

each of which was entitled, "In the Matter of H. R. Bridges, sometimes known as Harry R. Bridges. In Contempt." Upon these affidavits being filed, the trial court issue its order and directed petitioner to show cause why he should not be punished for contempt. The petitioner appeared, and both by motion to quash the order to show cause and by demurrer, raised the procedural question and contended that the proceeding against him was a criminal proceeding and should have been brought in the name of the People of the State of California, as plaintiff, and prosecuted by the district attorney of the county, or the attorney-general of the state, instead of being entitled as indicated above, and prosecuted as it was by three private attorneys purporting to represent the Los Angeles bar association. Both the motion and demurrer were held to be without merit, and accordingly the motion was denied and the demurrer was overruled. The petitioner thereupon filed a verified answer to the charge against him, and the case was then set for trial upon the issues made by said answer and the affidavits of Elkins, and others. Before trial of said cause, the petitioner filed a demand for a jury to try said issues, which demand was denied, and said trial was held and the cause decided by the court without a jury. Petitioner therefore contends that said proceedings were fatally defective, (1) because they were not entitled and prosecuted in the name of the People of the State of California, (2) because they were prosecuted by private attorneys and not by the district attorney of said county of Los Angeles, or by the attorney-general of the state, and (3) because petitioner was denied a jury trial.

[1] We shall first direct our attention to the first of these three questions, that is, as to the procedure followed in this proceeding by which petitioner was charged, prosecuted and found guilty of contempt of court in the manner stated above. We find that both the Penal Code and the Code of Civil Procedure contain provisions defining certain acts which they respectively denounce as contempts of court. By section 166 of the Penal Code it is provided that every person guilty of contempt of court of the kinds therein enumerated is guilty of a misdemeanor. Section 1209 of the Code of Civil Procedure provides that certain acts or omissions in respect to a court of justice enumerated therein are made contempts of court. There is a general similarity between acts set forth in either of these code

sections to those embraced in the other although in some respects the provisions of one of said sections differ from those contained in the other. Undoubtedly proceedings against a person charged with contempt of court under the provisions of the Penal Code should be entitled and prosecuted in the name of the People of the State of California, and by their authority. (Art. VI, sec. 20, Const. of California.) By section 1211 of the Code of Civil Procedure it is provided that, "When the contempt is not committed in the immediate view and presence of the court, or of the judge or justice at chambers, an affidavit shall be presented to the court, judge, or justice, of the facts constituting the contempt." Provisions are made by section 1212 of the Code of Civil Procedure for process to bring the accused person before the court where a trial [tol. 137] is had before the court. The person charged may challenge the judge of the court before whom he is brought for trial under section 170 of the Code of Civil Procedure. In the proceedings under review herein, the petitioner herein challenged Judge Schmidt under said section of the code, and by stipulation of the parties to said proceeding, the trial of said contempt proceedings was had before Judge Bishop of said superior court. In said proceeding, the procedure provided by the sections of the Code of Civil Procedure above cited was followed rather than that applicable to strictly criminal prosecutions.

[2] It is the position of the petitioner that the proceeding against him is a criminal prosecution, and therefore should be entitled, "The People of the State of California", and should be conducted in the name and by the authority of the People as provided by article VI, section 20, of the Constitution, which reads as follows: "The style of process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority."

If therefore the contempt proceeding against petitioner was strictly a "criminal prosecution", it should have been entitled in the name of the People and prosecuted by their authority, that is, it should have been entitled not only in the name of the People but should also have been conducted by the duly constituted prosecuting officers of the county in which the action was tried.

The precise character of a proceeding in contempt of court under the sections of the Code of Civil Procedure

cited above and similar statutes of other states has received frequent attention from the court of this and other jurisdictions.

In *re Morris*, 194 Cal. 63, was a habeas corpus proceeding brought to test the validity of petitioner's conviction of the charge of contempt of court. The petitioner had been prosecuted under the provisions of the Penal Code and found guilty as charged. He contended that his imprisonment under the judgment of conviction in said action was illegal for the reason that the court had no jurisdiction to punish him for contempt of court under the provisions of the Penal Code, as the exclusive jurisdiction to punish for contempt of court was vested in the court whose order petitioner was charged with violating. After reviewing certain features of the case, the court stated, (p. 68), "From these premises petitioner deduces the conclusion that the jurisdiction to punish as a contempt the violation of an order issued by the superior court of Sacramento County is vested solely and exclusively in that court. If we were to regard petitioner's act solely as an offense against the dignity and authority of that court, we would agree with this conclusion, and the cases so hold. [Citing cases.] But these cases do not hold that when an act which is a contempt of court is at the same time a specific criminal offense, denounced as such in the Penal Code, it will not be punishable as such. It was the plain intent of the legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the state of California, and remediable as such in accordance with the rules prescribed in the Penal Code. * * * Plainly the legislature did not intend to take away from the court contemned the power to punish a violator of its orders, but intended rather to provide an [fol. 138] additional remedy which should be in a sense cumulative, and which should be available in the courts possessing the appropriate criminal jurisdiction. These remedies were not intended to be concurrent, but rather cumulative in character. * * * " That case quotes with approval the following statement of the law from the supreme court of Montana (p. 71), " 'When prosecuted under

the Code of Civil Procedure, a contempt of court is not to be regarded as a criminal offense to be prosecuted only by complaint, information, or indictment, as laid down by Section 8 of Article III of the state Constitution, but, rather, as a special proceeding of a criminal character * * * Furthermore, the same acts which may be punished in the summary proceeding are characterized by the lawmaking power as criminal, and the additional remedy by an ordinary criminal action is provided for in Penal Code, Section 293.' (This is the same as our Penal Code Section 166.)" (*State* v. *Clancy*, 30 Mont. 193, 76 Pac. 10.)

The supreme court of Montana has further held that, "When prosecuted under the Code of Civil Procedure, a contempt of court is not to be regarded as a 'criminal offense' to be prosecuted only by complaint, information or indictment as laid down by Section 8, Article III of the State Constitution, but, rather, as a special proceeding of a criminal character—in that sense, it is a public offense, yet it is not one prosecution for which is exclusively controlled by the constitutional limitations circumscribing methods of prosecution of strictly criminal offenses." (*State ex rel. Flynn* v. *District Court*, 24 Mont. 33, 60 Pac. 493.)

The court in In re Morris, supra, page 70, also cites the case of Bessette v. W. B. Conkey Co., 194 U. S. 330, wherein is to be found the following statement: "A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action."

The precise point here involved was before the supreme court of Illinois and it was stated, "Section 33 of Article 6 of the Constitution provides that all prosecutions shall be carried on: in the name and by the authority of the People of the State of Illinois, and conclude: Against the peace and dignity of the same". The court then held, "The word, 'prosecutions' as used in the constitutional provision invoked, signifies only prosecutions of a public or criminal character and concerns the formal accusation of offenders by presentment or indictment by a grand jury or by information. (State of Illinois v. Froelich, 316 Ill. 77, 143 N. E. 476.) Contempts are not crimes within the meaning of the statute defining misdemeanors. * * * The particular constitutional provision has no application to a proceeding

to punish for contempt." (People v. Jilovsky, 334 Ill. 536, 166 N. E. 108. See also, In re Nevitt, 117 Fed. 448; McDougall v. Sheridan, 23 Idaho 191; State v. American-News Co., (S. D.) 253 N. W. 492.)

The Supreme Court of the United States in In re Debs, 158 U. S. 564, at page 596, makes the following statement, "In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

While in some decisions we find the direct statement made that a contempt proceeding is a criminal action, we find no authority which holds that a proceeding instituted by affi- [fol. 139] davit under a statute similar to the sections of the Code of Civil Procedure of our state relating to "contempts" has been held to be violative of the constitutional provision requiring all criminal prosecutions to be in the name of the People of the state and by their authority, while the cases are legion in which proceedings of that character have been sustained. In this state this court has invariably sustained such proceedings. (In the Matter of Tyler, 64 Cal. 434; Ex parte Karlson, 160 Cal 378; In re Shuler, 210 Cal. 377; In re San Francisco Chronicle, 1 Cal. (2d) 630, 636; In re Arnold, 204 Cal. 175; Blodgett v. Superior Court, 210 Cal. 1.)

In the San Francisco Chronicle case this court held as follows: "Under this section (Subdivision 7, Section 166, Penal Code) the act prohibited is both a contempt and a misdemeanor. The mere fact that the legislature has seen fit to declare such a contempt also a misdemeanor in no way deprives the court of the power to punish such act as a constructive contempt in a summary proceeding such as this." Our conclusion therefore is that contempt proceedings instituted under the provisions of the Code of Civil Procedure of this state are not strictly criminal actions but are special proceedings of a criminal character, and as such they are not within, or governed by, the requirements of section 20, article VI of the Constitution of this state. They are not thereby required to be brought in the name of the people of the state, nor prosecuted by their authority. Section 1211 of the Code of Civil Procedure is not at variance with said section of the Constitution. Section 1211 provides for the institution of said proceedings by affidavit, and contains no requirement that they be prosecuted by the

authority of the people. [3] In proceedings of this nature, the rule is well settled that, "it is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court". (13 Cor. Jur., Contempt, sec. 82, p. 60.) In the present instance, the proceedings were, as we have seen, instituted by the filing of an affidavit by the executive secretary of the bar association of the county of Los Angeles, a committee of three attorneys from said association acting as counsel in behalf of affiant. Thereafter the trial court appointed said attorneys to continue as counsel in the further prosecution of said proceeding. The procedure here followed was in all substantial respects like that approved in the case of Freeman v. City of Huron, (S. D.) 66 N. W. 928, where the court held: "Believing the course adopted in the court below was warranted by abundant authority, and that it did not tend to prejudice the accused in respect to any substantial right, we hold that there was no reversible error in the manner of entitling the affidavit and other papers, and that there was no error in allowing counsel, other than the state's attorney to conduct the prosecution."

[4] On the trial of the accused upon the charges made against him, he demanded a jury trial which was denied him by the trial court. Petitioner contends that he had the constitutional right to trial by jury. Section 1217 of the Code of Civil Procedure provides otherwise, that is, for a trial before the court in which the proceeding is pending. No authority in this state is cited by the petitioner in support of his present contention. It has been the universal practice in this state from its earliest history to try proceedings in contempt by the court without a jury. Scores of cases have been before this court in which the accused [fol. 140] has been tried and convicted of contempt as a result of trials by the court alone, and in not a single instance to which our attention has been called was the point ever raised that the accused was entitled to a trial by jury. "A respondent in contempt proceedings is not entitled to a trial by jury except where a jury trial is expressly provided for by statute, and then only in the particular cases to which the statute applies. The fact that the act constituting contempt may also be an indictable offense does not

affect the rule where the proceeding is not by indictment. The power of the court to punish summarily for contempt has existed from the earliest period of the common law and is not within the application of constitutional provisions guaranteeing a trial by jury, or providing against depriving persons of their liberty without due process of law." (35 Cor. Jur., Juries, sec. 99, p. 194. See, also, 16 R. C. L., p. 205, and cases cited in 48 Am. Dec. 192; 108 Am. St. Rep. 219, 119 Am. St. Rep. 727; Ann. Cas. 1913D 458; 9 L. R. A. (N. S.) 1119.) Finally, upon this point, we quote from the Debs case, supra, where the court, at page 594, states, "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

[5] We might also consider under the question of the proper procedure to be followed in proceedings of this character, the contention of petitioner that the affidavit accusing petitioner of contempt of court contains in some instances statements upon information and belief. While it is held in Ex parte Roth, 3 Cal. App. (2d) 226, that an affidavit based solely on information and belief without stating any authentic source of information is not an affidavit of facts prescribed by section 1211 of the Code of Civil Procedure and is insufficient as a basis of jurisdiction to support a warrant or order to show cause or a judgment in a proceeding in constructive contempt, the appellate court in In re Simoniello, 6 Cal. App. (2d) 425, pointed out that the Roth decision had failed to cite and was in conflict with the decision of this court in the case of Golden Gate Consolidated Hydraulic Mining Company v. Superior Court, 65 Cal. 187, and refused to follow the same. It is not contended that all or even the principal allegations in the accusatory affidavit against petitioner were made on information and belief, and therefore the Roth case, even if accepted by us, would not be controlling. However, we are satisfied with the statement of the law as expressed in the case of Golden Gate Consolidated Hydraulic Mining

Company v. Superior Court, as it appears to us that the reasoning therein is more logical and persuasive than that contained in the Roth case. The contention that the affidavit against petitioner gave the trial court no jurisdiction over him in the contempt proceedings by reason of the fact that it contained allegations made upon information and belief cannot therefore be sustained.

[6] We now pass to the second of the three major questions which we perceive are presented in this proceeding, and that is the question of the constitutionality of the last [fol. 141] sentence of subdivision 13 of section 1209 of the Code of Civil Procedure reading as follows: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

In the case of In re San Francisco Chronicle, 1 Cal. (2d) 630, the constitutionality of this provision of said section was squarely before the court, and after an extended examination of the authorities, we held unequivocally that said provision of said section invaded the constitutional powers of the courts, and was, therefore, of no validity. After setting forth the contention of the respondents that, under the provisions of section 1209, subdivision 13 of the Code of Civil Procedure, the publication of any article [whatever its contents] not in the physical presence of the court should not be treated as a contempt, this court on page 634 of the opinion held as follows: "The foregoing contention requires but brief consideration. That portion of section 1209 above quoted has many times been held unconstitutional on the ground that the courts have inherent power to punish for contempts, whether of a direct or constructive nature, and that the legislature cannot constitutionally infringe on that power. (In re Shuler, 210 Cal. 377, 397, 292 Pac. 481; McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. [N. S.] 619; In re Lindsley, 75 Cal. App. 122, 241 Pac. 934; Lindsley v. Superior Court, 76 Cal. App. 419, 245 Pac. 212; see, also, In re Arnold, 204 Cal. 175, 267 Pac. 316; Blodgett v. Superior Court, 210 Cal. 1, 290 Pac. 293, 72 A. L. R. 482; In re Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755.) What was said by this court in Briggs

v. Superior Court, 211 Cal. 619, 297 Pac. 3, in no way affects the rule above enunciated. It was therein held that the legislature may, in the case of a constructive contempt, provide for the procedure by which such contempt shall be tried and punished, but that case did not hold that the legislature can determine what shall constitute a constructive contempt, or declare that certain acts shall not constitute a constructive contempt. There is obviously a fundamental difference between a statute merely regulating procedure, as was involved in the Briggs case, and one such as section 1209, supra, purporting to affect the power of the courts to punish for contempt."

Ordinarily this citation from so recent a decision in which the prior rulings of this court are set forth in great detail would be considered a sufficient refutation of and a complete answer to the contention of petitioner that by the provisions of this section of the Code of Civil Procedure, he is shielded from prosecution for the publication of said telegram notwithstanding the contemptuous character of said publication. In attempting to sustain the constitutionality of said provision of the Code of Civil Procedure, and to overcome the array of authorities cited in our opinion in the San Francisco Chronicle case, petitioner cites no decision of this court, or any other appellate court of this state, supporting his theory of the law. On the other hand, he concedes that the rule of law enunciated in our former decisions, and reaffirmed so positively and definitely in the San Francisco Chronicle case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court. He insists, however, [fol. 142] that the courts of this state are fundamentally wrong in declaring said provision of the Code of Civil Procedure invalid as an invasion of the constitutional powers of the courts, and insists that we should rewrite the law applicable to the power of the court to summarily punish for indirect contempt, and in the revised version, hold that courts under the common law had no inherent power to punish for indirect or constructive contempt—that is, for acts committed without the immediate view and presence of the court; that this lack of power descended to the courts of this country, and, therefore, it always has been and is now within the power of the legislature, not only to provide for the procedure by which constructive contempts

shall be tried and punished, but also to determine what acts shall constitute constructive contempts, and further to declare that certain acts shall not constitute constructive contempts. In support of the proposal to have the law of constructive contempt rewritten, he has taken us back to a period in English jurisprudence antedating the time of Blackstone. He has seized upon the decision of the ancient case of Rex v. Almon, 97 English Reprints 94, and labeled it as the progenitor of a long line of spurious offspring that have infested the courts of both this and the mother country until recent investigation has revealed the irregularity of its birth and the falsity of its doctrine. It is even claimed that the author of the Almon opinion was responsible for the statement in Blackstone that, "The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." (Jones's Blackstone, Book IV, sec. 320.) In the language of an illustrous member of the Supreme Court of the United States (Justice Holmes in Gompers v. United States, 233 U. S. 604, 611) this suggestion "opens up vistas of antiquarian speculation", which while interesting to follow, in the end is productive of no beneficial result. From what appears to be most reliable sources, the opinion in Rex v. Almon, supra, was prepared by Justice Wilmot, then a justice of the King's Bench. He was afterwards Chief Justice of the Court of Common Pleas. While prepared probably about the year 1765, and during the period when Blackstone was delivering his famous course of lectures which thereafter were compiled by him in his Commentaries, this opinion was never adopted by the court or filed as the decision of the case in which it was prepared due to the fact that the case was abandoned before final judgment. It was never made public until the year 1802, some thirty-seven years after its preparation, and therefore years after Blackstone's famous Commentaries were published and in common use. It is surmised by those attacking the doctrine of this decision that because Blackstone and Wilmot were close

friends, they conferred together and probably discussed the question involved in the Almon case and that Blackstone was induced by Wilmot to accept the latter's theory of the law of the inherent power of the court in matters of contempt, and so stated it in his Commentaries as quoted above. To now hold upon mere surmise that Blackstone relied upon the author of the opinion in the Almon case, [fol. 143] and therefore his statement of the law should be discredited, would be extending the doctrine of "antiquarian speculation" beyond all reasonable limits.

But even conceding that petitioner's claims respecting the authority upon which Blackstone based his statement are true, it cannot be disputed that the views expressed by him were then the law in England and continued to be for years thereafter. When the Wilmot opinion in the Almon case was published in 1802, it only strengthened the rule announced by Blackstone. For a long list of cases from the various English courts, extending over a period of time beginning in 1821 and including the year 1925, in which Wilmot's doctrine is applied or in which Almon case is cited with approval, see "Contempt of Court", by Sir John Fox, page 30.

Courts in this country followed the rule adopted by the English courts, and previous to any statute limiting their power, held practically without exception that they had the inherent power to summarily punish for contempt acts committed without their view or presence. However, by act of Congress enacted in the year 1831 (Rev. Stats., sec. 725; Jud. Code, sec. 268; U. S. C. A. Title 28, sec. 385) it was provided that, "The said courts [United States Courts] shall have power to punish by fine or imprisonment at the discretion of the court, contempts of their authority. Such power to punish for contempts shall not be construed to extend to any cases except misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." This statute was followed by legislation in several of the states in which similar restrictions were attempted to be placed upon the courts of their respective states. This legislation was at first generally sustained by the courts. However, in 1918, the Supreme Court of the United States, notwithstanding the existence of the statute of 1831, sustained the conviction of the editor of a newspaper upon a charge of contempt of court based upon the publication of certain articles in said news-

paper. (Toledo Newspaper Co. v. United States, 247 U. S. 402.) The effect of this decision was to declare inoperative and ineffective for any purpose the limitation attempted by Congress to be placed on the power of the court to summarily punish for an indirect contempt, that is, to punish an act committed without the view and presence of the court. This decision has been followed generally by the United States courts. (Francis v. People of Virgin Island, 11 Fed. [2d] 860, 863-5; In re Independent Publishing Company, 240 Fed. 849; U. S. v. Providence Tribune Co., 241 Fed. 524; U. S. v. Markewich, 261 Fed. 537; U. S. v. Sanders, 290 Fed. 428.)

The supreme court of the state of Arkansas had, previous to the decision in the Toledo Newspaper case, held that the legislature was without power to limit the jurisdiction of the courts to punish for acts of contempt committed without the presence of the court. (State v. Morrill, 16 Ark. 365.) During and since the reassertion by federal judges of summary powers as to publications, the courts of the following states, seventeen in number, have sanctioned the rule announced in the Toledo Newspaper case—Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Indiana, Maryland, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. The courts of eight other states have expressed views which indicate that they are in harmony with the rule announced by the Supreme Court of the United States. [fol. 144] They are Iowa, Kansas, Minnesota, Mississippi, Nevada, Oregon, Wisconsin, and Wyoming. We have already shown the attitude of the courts of this state upon this question. In a few states the subject seems not to have been considered. Only four states out of the forty-eight states of the Union seem definitely committed to a contrary doctrine. They are Pennsylvania, New York, South Carolina and Kentucky. In each of these states, the statutes in question are over one hundred years old. (For a further discussion of this subject and the authorities cited in support of the foregoing statements see 28 Columbia Law Review, p. 542.) From the foregoing it will appear that the overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion. While we commend the diligence and industry displayed by counsel in their investigation and consideration of the subject, we find ourselves

unable to agree with them in their contention that the legislature may limit the power of the court to summarily punish for contempt acts committed without the view and presence of the court. The last sentence of subdivision 13 of section 1209 of the Code of Civil Procedure above quoted is unconstitutional on the ground that the courts of the state have inherent power to punish for contempt whether of a direct or constructive nature, and the legislature cannot infringe on that power.

[7] In considering the third major question presented by the record in this proceeding; it is important that we keep in mind the nature of the particular proceeding before us, and not confuse it with the ordinary appeal from judgment, nor with an original proceeding in contempt before a trial court. On petition to review the judgment of the trial court, it is definitely settled that the sole question before the reviewing court is one of jurisdiction of the trial court to render the judgment under review. If it be determined that in the rendition of said judgment the trial court acted within its jurisdiction, then the inquiry ends, and the only order the reviewing court is authorized to make is one affirming the proceedings of the trial court. On the other hand, should it appear from the record as certified to us that the court either had no jurisdiction to pronounce said judgment, or exceeded its jurisdiction in doing so, then the proceedings should be annulled. (Sec. 1075, Code Civ. Proc.) Other than as just indicated, the writ of certiorari will not be granted to review errors of law (People v. Latimer, 160 Cal. 716), or mere questions of fact. (White v. Superior Court, 110 Cal. 60.) [8] However, in passing upon the question of the trial court's jurisdiction, the reviewing court may consider the evidence before the trial court for the purpose of determining whether it was sufficient to give that court jurisdiction to render its judgment finding the accused guilty of contempt, and in case the court finds that the evidence is insufficient to sustain the conviction it will annul the judgment. (McClatchey v. Superior Court, 119 Cal. 413; Hotaling v. Superior Court, 191 Cal. 501, 506, and Titcomb v. Superior Court, 220 Cal. 34, 44.) But in such a case, the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court. (Daily v. Superior Court, 4 Cal. App. [2d] 127, 134; Mc-

Farland v. Superior Court, 194 Cal. 407; In re Brambini, 192 Cal. 19; Strain v. Superior Court, 168 Cal. 216, 223; White v. Superior Court, 110 Cal. 60, 64; Imperial Water Company v. Board of Supervisors, 162 Cal. 14.) There [fol. 145] is nothing contrary to this rule to be found in In re Buckley, 69 Cal. 1, 3, nor in Hotaling v. Superior Court, supra, or in any other case to which our attention has been called, as all of those cases were original proceedings before this court. In proceedings of that nature, the same rule governs the trial court in contempt proceedings is applicable to this or any appellate court at the hearing of contempt proceedings originally brought in such courts. [9] It has repeatedly been held that an accused on trial for contempt must be proved guilty beyond a reasonable doubt. But such rule, as will be seen from the authorities cited above, has no application in a proceeding such as the one before us, to review the judgment of the trial court in finding the accused guilty of contempt.

In considering the evidence before the trial court in the light of the rule just stated, it is our sole duty to determine whether such evidence is of sufficient substantiality to support the judgment of conviction, or as stated in Daily v. Superior Court, supra (p. 124): "In the proceedings before us, the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction." The evidence in this matter is comparatively simple. The case of Walker v. International Longshoremen's Association, District Local 38-82, Inc., No. 420356, mention in the first paragraph of this opinion, was in fact a contest between the American Federation of Labor, hereinafter referred to as the A. F. of L. and the Committee for Industrial Organization, hereinafter referred to as the C. I. O., over the possession of the hiring hall maintained at San Pedro, California, for the longshoremen at said port. Petitioner was the president of the International Longshoremen's and Warehousemen's Union, a C. I. O. organization, the jurisdiction of which organization extended to all its subsidiary unions on the Pacific Coast. While not a party to said action, petitioner, as the president of the C. I. O. organization on this coast, was directly and vitally interested in the result thereof, and was particularly interested in seeing that the defendant prevailed in said action. The action was tried, and the court ruled in favor of the plaintiffs in said action, and appointed a receiver to have charge of the hiring

hall, which, as we have seen, was the subject of the controversy between the parties thereto. The action was one which attracted great public interest and to which the newspapers of the county of Los Angeles and other parts of the state gave wide and extensive publicity. The judgment in said action was rendered on January 21, 1938. The petitioner was then in San Francisco, and on January 24th, from his headquarters in that city he dictated to his stenographer a telegram to the secretary of labor and gave a copy thereof to James D. O'Neil, a trained newspaper man of more than twenty years' standing, who was in charge of the publicity bureau maintained by the petitioner as the executive officer of the C. I. O. in the city of San Francisco. O'Neil gave a copy of said telegram to one of the city papers of San Francisco and on that day and the following day that portion of the telegram set forth in the findings of the trial court was published in the metropolitan papers of the city of San Francisco and Los Angeles and elsewhere in this state.

Upon this evidence the trial court found, "That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto [thereof] to be given to one James D. O'Neil for the purpose and with the intent that the contents of the said telegram should, and [fol. 146] would be furnished to and published in the newspapers on the Pacific Coast and elsewhere." It is contended by petitioner that the evidence does not support said finding. In discussing the evidence respecting the publication of said telegram, the trial court reasoned as follows: "He [the petitioner] dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not [have] an express command respecting publicity, you are going to have publicity, because of the telegram itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it because it was an established custom. When the copy of that telegram was put in the hands of a man, who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it direct to the newspapers."

[10] We are in entire agreement with the conclusion reached by the trial court in holding the petitioner respon-

sible for the publication of said telegram. Mr. O'Neil testified that he handled the publicity of the C. I. O. for the West Coast and had an office three doors from the reception room of the C. I. O. in San Francisco, and four doors from Mr. Bridges' office; that Mr. Bridges "was news wherever he goes," that he [O'Neil] handled the publicity of telegrams released or received by Mr. Bridges, that copies of all telegrams "that had anything to do with the C. I. O., most of them came to my desk", and that he then determined whether any particular telegram was newsworthy and susceptible of being sent to the press for publication. We think that there can be no doubt from the testimony of Mr. O'Neil that petitioner not only had every reasonable ground to believe that his telegram would be given to the public press for publication but that the regulations of his organization made it the duty of O'Neil to see that the papers were apprised of the telegram in order that publicity might be given to its contents. In our opinion, there was ample evidence to sustain the finding of the trial court that petitioner gave to O'Neil the copy of the telegram sent to the secretary of labor with the intent that the contents thereof would be furnished to and published in the newspapers on the Pacific Coast and elsewhere.

[11] Finally petitioner contends that his act in publishing the telegram, even conceding that he was responsible for its publication, did not constitute a contempt of court. He claims in the first place that the final judgment in the action of Walker v. International Longshoremen's Association had been entered some days prior to the publication of said telegram and therefore the action to which he referred in his telegram was no longer pending. In assuming that the Walker action had been finally disposed of, and was therefore no longer pending, petitioner is in error. The time for moving for a new trial in said action had not yet expired, and until the action had reached that stage, it cannot be said that it had ceased to be a pending action in that court. (Sec. 1049, Code Civ. Proc.) The case was still before Judge Schmidt at the time of, and long after, the publication of said telegram.

[12] This brings us to the question whether the publication of that portion of the telegram set out in the findings, respecting the decision of Judge Schmidt, while the action in which said decision was rendered was pending, consti-

tuted a contempt of court. It is not necessary for us to restate the contents of the published article in full. It con- [fol. 147] tains the following statements: "This decision is outrageous." "Attempted enforcement of Schmidt decision will tie up port of Los Angeles and entire Pacific Coast." "International Longshoremen's & Warehousemen's Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override majority vote of members in choosing its officers and representatives." The published statement was not only a criticism of the decision of the court in an action then pending before said court, but was a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up. Furthermore, it contained a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision. When these statements are considered in connection with the extensive publicity that had already been given to the pending action, and the prominent position of the petitioner as the executive officer of an organization to which 11,000 longshoremen on the Pacific Coast belonged, we think that there can be no question that their publication in the metropolitan papers on the Pacific Coast, and particularly those in the county of Los Angeles in which said court was held, tended materially to affect the orderly administration of justice in the case to which reference was made and which was then pending in said court. If such would be the effect of such publication, and in our opinion, that was its effect, then the act of publishing such statements was a contempt of the court in which such action was pending. (In re Shuler, 210 Cal. 377; In re San Francisco Chronicle, 1 Cal. [2d] 630; Bee Publishing Co. v. State, 185 N. W. 339; State of Nebraska v. Lovell, 222 N. W. 625; Toledo Newspaper Company v. U. S., 247 U. S. 402; People v. Wilson, 64 Ill. 195 [which case this court cited with approval in the San Francisco Chronicle case]; Patterson v. Colorado, 205 U. S. 454; Sinclair v. United States, 279 U. S. 749, 764.)

[13] In these cases it was held that if the publication or act in question had a "reasonable tendency" to interfere with the orderly administration of justice in pending actions before judicial tribunals, it amounted to a contempt of court and might be punished as such. The Patterson case, supra, clearly states that the test to be applied in determining

whether a party is guilty of contempt is whether the act complained of had a "reasonable tendency" to interfere with the orderly administration of justice. The opinion in that case was written by Mr. Justice Holmes and was cited with approval in the Shuler case [In re Shuler, supra, p. 403], and this court quoted from that case as follows [page 462]: "In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own [fol. 148] reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

In the case of Sinclair v. United States, 279 U. S. 749, a somewhat similar statement was made by the court, but in language as follows [Page 764]: "But the situation is controlled by the reasonable tendencies of the acts done, and not by the extreme and substantially impossible assumptions on the subject. Again, it is said that there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by . . publications and therefore there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard

to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

Further on in the opinion, the court reiterates that, "The reasonable tendency of the acts done is the proper criterion." While this opinion was written by Justice McReynolds, it was concurred in by Justice Holmes. We mention Justice Holmes's participation in these two cases, as petitioner has cited opinions by this illustrious jurist, probably a majority of which were dissenting opinions, simply to show that while in other cases upon apparently different statements of fact, Justic Holmes has expressed certain conclusions upon which petitioner relies in support of his contention that the "reasonable tendency of the act done" is not the proper criterion to be applied in such cases, at least in these two cases, Justice Holmes has approved the "reasonable tendency" criterion.

We have called particular attention to these cases from the Supreme Court of the United States, in addition to those from our own court, for the reason that petitioner contends that the "reasonable tendency" doctrine is not the true test to be applied in determining whether the act done constituted contempt of court, and in support of his contention, he has cited opinions, both majority and dissenting, to be found principally in the Reports of the United States Supreme Court. The tests which are mentioned in various of these opinions, any one of which petitioner insists is the only true and proper test, and should, therefore, be applied in this case, are referred to by different judges as the "inherent and dangerous tendency", the "clear and present danger", and "the actual obstruction principle". It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were [fol. 149] rendered. We are, therefore, content to rest our decision upon the "reasonable tendency" test in determin-

ing whether the publication or act done constituted a contempt of court. The application of this test to the publication by petitioner of that portion of said telegram recited in the findings of fact of the trial court, clearly renders said publication a contempt of court.

[14] Petitioner relies with much earnestness upon his constitutional right of free speech to justify his publication of the quoted portion of the telegram sent by him to the secretary of labor. A large number of pages of the briefs in behalf of petitioner are devoted to the right of an individual to freely speak his views and to the importance of this constitutional right of free speech. It may be conceded that all that has been said in these briefs as to the importance of the right of free speech and of a free press in a democracy meets with the approval of this court. In fact, we are in thorough accord with petitioner's claim that the right of free speech and of a free press are among the greatest bulwarks of the freedom which, as citizens of this country, we enjoy. But as was said in a recent decision of the Supreme Court of the United States, "the right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom." (Stromberg v. California, 283 U. S. 359, 368.)

This contention of petitioner that he is protected in the publication of said telegram by the constitutional right of freedom of speech is in our opinion completely answered by what we said in In re Shuler, supra, at page 402: "The constitutional guaranties of freedom of speech and of the press do not, in our opinion, and in the light of the authorities which we are about to cite, go so far as to protect the citizen in making such comment by either spoken or written utterances with respect to causes pending before courts of justice, as have for their purpose and manifest tendency an attempted interference with the orderly administration of justice before such tribunals and in respect to causes pending and in course of conduct therein." In that case, as in the case now before us, the petitioner attempted to justify his animadversions of the court by the claim that his utterances were protected by the right of free speech. In an opinion concurred in by all the members of this court we held that his claim was without merit. The same conclusion must be followed in this action respecting petitioner's claim of immunity.

In addition to the three questions hereinbefore discussed,

petitioner has raised other questions which may be regarded as of minor importance but which are of sufficient consequence to require answers.

[15] He contends that as he did not personally cause said telegram to be published he is not liable for criminal contempt for the act of his agent in publishing the same without his direction. If the evidence supported the facts recited in this statement, we would have no hesitancy in sustaining said contention. But as we have seen, the trial court found that petitioner caused his agent to make said publication, and we have held that this finding is supported by substantial evidence in the record. Petitioner having directed the publication of said telegram by his agent, is personally liable for any infraction of the law due to said publication equally with his agent.

Petitioner further contends that the sending and publication of said telegram by him as a labor official to the secretary of labor respecting labor matters is protected by the [fol. 150] constitutional guarantee to engage in a lawful occupation. We thoroughly agree with petitioner that the sending of a telegram to the secretary of labor was within his constitutional rights, and one might go further and hold that it was within his duties as the executive head of the union affected by the decision of Judge Schmidt to inform the secretary of labor of said decision, but he was not charged nor punished for the sending of the telegram. It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty.

[16] Finally petitioner contends that the trial court exceeded its jurisdiction in adjudging petitioner guilty of contempt of court because it had no jurisdiction to make the order in the original action out of which action the alleged contempt arose. This contention is based upon what petitioner conceives to be the legal effect of federal legislation establishing the National Labor Relations Board and conferring upon that board certain powers respecting labor disputes. We do not understand that that legislation has taken from the state court jurisdiction of disputes of the nature of that involved in the case of Walker v International Longshoremen's Association which was pending before Judge Schmidt's court. Petitioner has cited in support of this last contention the case of Fur Workers Union No. 72 v. Fur Workers Union, 105 Fed. (2d) Advance Sheet No.

1, page 1, decided by the United States Court of Appeals, District of Columbia, on March 27, 1939. We find nothing in the decision of that case which tends to support the contention of petitioner that the Superior Court of the County of Los Angeles was without jurisdiction to hear or decide the issues involved in the Walker v. International Longshoremen's Association case.

In considering the questions herein discussed we had access, not only to the able briefs and arguments of counsel in this case, but also those in the two cases, entitled, The Times-Mirror Company, a Corporation, et al. v. Superior Court, and numbered respectively L. A. 16928, and L. A. 16929, now before us on petitions to review judgments of contempt. All three of these cases were argued with the understanding that both the arguments and briefs filed in any one of said cases either by the respective parties or by amici curiae might be used by the court in the decision of any one or more of the other cases. It was in pursuance of this understanding that we have had the benefit of the argument and briefs of the Times-Mirror cases in this decision of the present one.

For the reasons herein stated we are of the opinion that the proceeding adjudging petitioner guilty of contempt of court must be affirmed.

It is therefore ordered that the judgment of the trial court be and the same is hereby affirmed.

Curtis, J.

We concur. Shenk, J.; Nourse, J., pro tem.; Waste, C. J.; Houser, J.

DISSENTING OPINION

The petitioner published a statement concerning Judge Schmidt and the merits of a case which had not been finally decided. Such an act, the legislature has declared, shall not constitute a contempt of court. In my opinion, judicial officers have no inherent power to punish for a constructive contempt, and the statute which provides that "no speech or publication reflecting upon or concerning any court or [fol. 151] officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings" (sec. 1209, Code

Civ. Proc.) is constitutional. This law, passed in 1891, expresses the constitutional guarantees of free speech and a free press and should be upheld.

The California statute is in substantially the same form as those of many other states upon this subject. Unquestionably the legislative purpose has been to prevent abuses of uncontrolled power. However, such enactments, with few exceptions, have been swept aside as unconstitutional efforts to trench upon judicial authority. These decisions are posited upon the assumption that the right to hold one guilty of either a direct or a constructive contempt, summarily and without a jury trial, is "inherently necessary" to judicial administration and is founded upon "immemorial usage" at common law. Yet neither the declarations of the courts in support of their dignity and independence, nor the enactments of legislative bodies upholding freedom of speech and the press, have settled the seemingly irreconcilable conflict. Whenever vital issues affecting the public interest are presented for adjudication and editors or citizens of positive views comment upon either the facts of a case or the principles which are claimed to govern the result, the question whether a judge may punish for contempt usually arises, Phoenix-like, from the ashes of earlier controversies.

Modern legal scholars have made an extended study of the principles upon which the law of contempt by publication rests and conclude that much of what has been judicially relied upon as authority to punish for such an act is fiction. The writers of an exceptionally well-considered article in the Columbia Law Review, after a most thorough investigation, assert that the rules of the common law do not support the claims which have been made for them. (Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525.) In short, it now appears that in this branch of the law, the courts have built a structure of judicial reasoning upon the sands of precedents which do not exist.

The first enactment upon the subject of contempts was that of the statute of Westminster (13 Ed. 1, c. 39) which was adopted seventy years after the date of Magna Charta. This statute concerns contempts in resisting the process of the King's courts, a class defined by Blackstone as consequential contempts, and it seems most unlikely that this legislation would have been enacted if the power to punish

such offenses constituted a part of the law of the land which existed so long before Magna Charta as to be considered a maximum of jurisprudence. In any event, the first newspapers were established 350 years after the date of Magna Charta, and the offense of contempt by publication must, therefore, be of much later origin.

Early in our own national history the question was presented by a case in Pennsylvania which arose out of the campaign for ratification of the federal Constitution. A newspaper editor named Oswald, who was the leader of the opposition to ratification, was arrested for a libel. He countered in the columns of his newspaper with the charge that the prosecution was prompted by political motives, and for this publication he was ordered to show cause why he should not be attached for contempt. In support of the attachment counsel relied upon Blackstone and a dictum in [fol. 152] Roach v. Garvan, 2 Atkyns 469 (1742), which was a decision by the English Court of Chancery not based upon any common law precedent. (See Fox, Contempt of Courts, p. 22.) Chief Justice McKean of Pennsylvania, in deciding the case, stated that "proceeding by attachment is as old as the law itself and no act of the legislature, or section of the Constitution, has interposed to alter or suspend it" and he concluded that since the Constitution guaranteed trial by jury only "as heretofore," the summary procedure was proper. (Respublica v. Oswald, 1 Dallas 319.)

According to Blackstone's Commentaries, either "speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity" or "printing false accounts of causes then pending in judgment" was punishable by immediate attachment. In such a proceeding, Blackstone said, the court's power "results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal." (4 Blacks. Com. 284 et seq.) Largely upon the authority of Blackstone's views, the Pennsylvania court concluded that summary process and trial was proper in all contempt proceedings. Oswald was fined and imprisoned, but upon his release he memorialized the legislature for the impeachment of the justices of the Supreme Court. After consideration of the charges a resolution was adopted denying articles of impeachment. Later a proposal to define the nature and extent of contempts was introduced in the legislature, but the measure was defeated

by a Federalist majority. (See note to Respublica v. Oswald, supra, p. 329 et seq.)

The concept of freedom of the press, stated by Blackstone, is completely foreign both in time and place to the fundamental principles of American institutions. The doctrine that "the liberty of the press * * * consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published" (5 Blacks. Com. 151) is a statement of the British law at a time when seditious libel was punishable as a crime; it is not the interpretation of a constitution. Moreover, that law has been very differently declared in the last one hundred and twenty-five years. (See Chafee, Freedom of Speech, [1920] 8 et seq.)

It now appears probable that Blackstone's notions of "immemorial usage" concerning the authority of a court to summarily punish for contempt by publication were based upon the draft of an "opinion" in The King v. Almon written by Wilmot, J., about 1765, three or four years before the publication of the Commentaries. (See Fox, Contempt of Courts, p. 21.) A rule nisi had been obtained to attach John Almon, a bookseller, for publishing a libel on the Chief Justice, Lord Mansfield, and after argument Wilmot prepared an opinion. In answer to the contemnor's claim that summary procedure by attachment was inappropriate, he stated: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Ventris I, and the issuing attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the lex terrae and within the exception of Magna Charta as the issuing of any other legal process whatsoever. * * * And though I do not mean to compare and contrast attach-[fol. 153] ments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trial by juries do—immemorial usage and practice. (Wilmot's Notes, p. 254.)" (Fox, supra, pp. 7, 8.)

The proceeding against Almon was aborted by a procedural defect and was subsequently abandoned with a

change of ministry; consequently, Wilmot's decision was never delivered. However, almost 40 years later it was published with his other papers, and has been cited and relied upon as a correct statement of the law ever since. Sir John Fox comments upon it as follows: "Never pronounced in court, this extrajudicial opinion did not possess the binding effect of a decision, but it acquired the singular distinction of becoming a leading authority by citation and approval in subsequent cases, the earliest of which was decided fifty-six years after the opinion was written. No higher testimony to Mr. Justice Wilmot's reputation for learning and ability could be given than this that his opinion was adopted by succeeding judges without question and without examination of earlier authorities." (Fox, supra, p. 8.)

Here is one of the strangest stories in the history of the law. The most remarkable part of it is that the earlier authorities, with the exception of the decisions of the Star Chamber, required prosecution by indictment, presentment and arraignment for contempts committed by "strangers" to the court, and the contemnor was entitled to a trial by jury. (See Solly-Flood: "Prince Henry and Chief Justice Gascoigne," Transactions of the Royal Historical Society, vol. 3, N. S., p. 47; Fox, supra, p. 227 et seq.) But Blackstone followed the posthumous views of his friend Wilmot, and the supreme court of Pennsylvania in the Oswald case based its decision upon a doctrine which was historically incorrect. Thus the opinion of an English judge in an undecided case was given the authority of a precedent in the new country.

A decade later the same question was reviewed in the case of Respublica v. Passmore, 3 Yeates, 440. Passmore, by posting a notice in the exchange room of the city tavern, denounced his adversary in a pending appeal as "a liar, a rascal and a coward." For this he was attached for contempt and was found guilty and sentenced to fine and imprisonment. The controversy then passed from the court to the legislature, but by this time the Federalists were in a minority, and articles of impeachment were preferred against the three Federalist judges who had found Passmore guilty. In the state senate the vote was 13 to 11—two votes short of the necessary two-thirds for impeachment. (See Nelles and King, supra, p. 414.) But shortly afterward a statute was passed restricting the judicial power

over contempts to its true historic limits: (1) official misconduct of court officers; (2) disobedience of process; and (3) misbehavior, in the actual presence of the court which actually obstructs the administration of justice. (1808-09 Pa. Acts, c. 78, p. 146.) Although the statute has since been amended, it has stood as the law of Pennsylvania from the date of its enactment to the present time. (1920 Dig. Pa. Stat. L., secs. 5484-5488.)

The history of legislation in New York concerning punishment for contempt has a similarly interesting background. In 1803, Chancellor Kent asserted the same broad summary power which had been maintained by Chief Justice McKean in Pennsylvania. (People v. Freer, 1 Caines 518.) However, the power was moderately used in New [fol. 154] York, and only once did public clamor arise over its exercise. That occasion grew out of an attachment of one Yates, who was charged with illegally practicing as a solicitor—a contempt which is within the historic scope of the power to punish summarily. Yates sought habeas corpus in the supreme court and the writ was dismissed, after which he appealed to the "Court for the Trial of Impeachments and the Correction of Errors," which consisted of the justices of the supreme court and the members of the state senate. That body reversed the supreme court and held that Yates should have been discharged. (Case of [illegible] V. N. Yates, 6 Johns, 337.)

Yet it was not until 1829 that New York limited the judicial power in contempt proceedings. By legislation then adopted, with the exception of permitting punishment of "a false, or grossly inaccurate report of its proceedings," the summary powers of the New York courts were confined to direct contempts tending to interrupt their proceedings and any resistance to or disobedience of their orders or process. (N. Y. Rev. Stat. of 1829, part 3, chap. 3, title 2, art. 1, sec. 10.) Historically, it is said that this statute reflects the views of Edward Livingston, who considered the power of summary punishment to be repugnant "to all the fundamental principles which secure private rights in the administration of justice," and argued that there is no true necessity for a court to undertake the punishment of its own offenders. (See Nelles and King, supra, p. 419.)

The early development of the contempt power in the federal courts presents a true parallel to the Pennsylvania experience. Section 17 of the Judiciary Act of 1789 empow-

ered the courts of the United States "to punish by fine or imprisonment * * * all contempts of authority in any cause or hearing before the same." There were several cases under this provision containing intimations of "inherent" power (U. S. v. Hudson, 7 Cranch 32; (Anderson v. Dunn, 6 Wheat. 204, 227), but the first decision directly passing upon a conviction for contempt by publication, summarily imposed, did not arise until the notorious Peck-Lawless controversy in 1826.

With the acquisition of the Louisiana territory earlier in the century, there was a wild speculative scramble for land claims. Although public lands in the territory had not yet been opened up for preemption, previous grants by Spanish and French authorities were recognized. Fraud and forgery in efforts to prove such grants were rife, and there was great public interest in litigation over land claims. Lawless, who was an attorney representing a large group of claimants, appeared as counsel in a case brought to test the validity of such a grant. Judge Peck, the federal judge for Missouri, decided one case against him, and Lawless countered with a newspaper article criticizing the decision. Judge Peck promptly attached Lawless for contempt and, after a hearing, found him guilty, imposing a sentence of one day's imprisonment and suspension from practice for 18 months.

Lawless, who had influential friends in Washington, then memorialized congress for Peck's impeachment. After a trial which consumed a large part of the session of 1830-31, Judge Peck was acquitted by a narrow margin. (See Stansbury, Trial of James H. Peck [1833].) However, the episode immediately precipitated legislation on the question of summary judicial power in contempt proceedings. A federal statute enacted in 1831 provided that "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence [fol. 155] of said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts * * * and the disobedience or resistance by any officer * * * party, juror, witness or any other person * * * to any lawful writ, process, order, rule, decree or command of the said courts."

The words "misbehaviour * * * so near thereto as to

obstruct the administration of justice" were inserted to include, within the definition of contempts, breaches of the peace near the court house which might interrupt judicial proceedings. (See Nelles and King, supra, p. 530.) By other provisions of the statute, acts formerly designated as contempts, such as attempts to influence jurors, witnesses or officers or attempts to obstruct or impede the administration of justice by threats or force were made punishable by the regular process of indictment and trial. Act of March 2, 1831, c. 99; 4 Stat. 487; now U. S. Code, secs. 385 and 241. Again, by legislation, summary judicial power was expressly restricted to its true historic limits.

General public agreement with the policy exemplified by the federal statute and those of Pennsylvania and New York is indicated by the fact that numerous other states soon adopted similar laws. By 1860, 23 of the 33 states of the Union had adopted acts limiting the summary power to punish for contempt. (See Nelles and King, supra, p. 533.) And with the exception of New Hampshire and Arkansas, these limitations were respected in every jurisdiction where they were questioned. (Ex parte Poulson, Fed. Cas. No. 11350, 1205-9 [1835]; U. S. v. Holmes, Fed. Cas. No. 15383 [1842]; Stuart v. People, 3 Scam. 395 [Ill. 1842]; Ex parte Hickey, 4 Smedes & Marshall 751 [Miss. 1844]; State v. Dunham, 6 Iowa 245 [1858]; Brown & Calkins Case [1854], see Ashbaugh v. Eau Claire, 97 Wis. 1, 11; Foster v. Comm., 8 Watts & Sergeant 77 [Pa. 1844].)

The New Hampshire court held that the writer of an article constituting a contempt might be punished summarily, notwithstanding the statute of that state, but in reaching that conclusion it relied upon Respublica v. Oswald, supra, which, as has been pointed out, followed the fallacious doctrine of Blackstone based upon the writing of Judge Wilmot. (Tenney's Case, 23 N. H. 162, 185.) This decision has not attracted general attention and is referred to infrequently. However, the case of State v. Morrill, 16 Ark. 384, like The King v. Almon, supra, has had an unusual influence in shaping the law concerning contempts. It has been cited and relied upon as an authority in many states, including California, and as it is the first decision in the United States which set aside a statute limiting a court's jurisdiction over alleged contempts, it merits particular attention.

In an editorial in his newspaper, Morrill intimated that the justices of the state supreme court had been guilty of

bribery in a criminal case. They summoned him to show cause why he should not be adjudged in contempt. In a lengthy opinion, which added little that was new to the subject, the court sustained its power to punish summarily notwithstanding legislative limitation to specified acts "and no others". By constant repetition, factitious weight was given to the assumption that such power is inherent, necessary, and traditional. The court quoted at length from Blackstone, Roach v. Garvan, supra; Respublica v. Oswald, supra; The King v. Almon, supra, and from earlier Arkansas cases of direct contempt. Cases which had sustained the limitations placed by congress upon the federal courts were [fol. 156] held inapplicable upon the ground that the lower federal courts were the creatures of congress and not of the Constitution. The Peck-Lawless case was distinguished upon the ground that Lawless had "published a criticism upon the opinion, not impugning the motives or charging corruption upon the judge, but discussing the correctness of the opinion" and "the distinction between constitutional freedom, and licentious abuse of the press, is now so well understood in this country, that no American judge could consider himself authorized to punish as for contempt, authors of publications of the character of that made by Mr. Lawless".

Morrill was finally discharged upon filing a response under oath denying any intention to commit a contempt. (State v. Morrill, 16 Ark. 412.) But this decision led the way for a series of cases which cast off the legislative fetters in almost every jurisdiction where they had been imposed. (See Nelles and King, supra, pp. 554, 562.) The basis for the asserted authority of a court to ignore statutory regulation of the power to summarily punish for contempt was, most frequently, said to be that it is unconstitutional as trenching upon an inherently necessary and immemorially exercised power. (See for example, State ex inf. Crow v. Shepherd, 177 Mo. 205; State v. Frew, 24 W Va. 416.) Other cases hold that legislation on the subject of inherent judicial power is merely declaratory and is not binding on the courts. (See Dale v. State, 198 Ind. 110.)

In a third class of cases the same result was achieved by construing the phrase "in the presence of the court or so near thereto", adopted from the federal statute, as applying to contempts by publication upon the theory that a widely circulated newspaper is constructively present in or near

to the court. (See People v. Wilson, 64 Ill. 195; Myers v. State, 46 Ohio St. 473.) Only in Pennsylvania, New York, Kentucky and (probably) South Carolina have the legislative limitations been respected (Ex parte Steinman, 95 Pa. St. 220; Rutherford v. Holmes, 5 Hun. 317, 319, affd. 66 N. Y. 367; Adams v. Gardner, 176 Ky. 252), but it is worthy of note that the courts of these states have become neither contemptible nor inefficient.

For some 75 years, the federal courts construed the congressional statute as a limitation upon their power to summarily punish for a constructive contempt. (Ex parte Poulson, [1835] supra; Ex parte Robinson, [1873] 19 Wall. 505, 510.) After 1900, moreover, there were indications that the requirement of physical proximity might be interpreted so as to include newspaper comment (Ex parte McLeod, [1903] 120 Fed. 130, 140; U. S. v. Huff, [1913] 206 Fed. 700, 704), but it was not until 1915 that the constructive presence doctrine was extended to contempts by publication. In that year the Toledo News-Bee published articles and cartoons which intimated that a United States district judge was biased in litigation pending between the city of Toledo and a traction company. The newspaper and its editor were adjudged guilty of contempt in a summary proceeding (U. S. v. Toledo Newspaper Co., 220 Fed. 458); and the judgment was sustained by the United States Supreme Court in Toledo Newspaper Co. v. U. S., 247 U. S. 402, Justices Holmes and Brandeis dissenting. Chief Justice White, who wrote the majority opinion, held that it was "essential to recall the situation existing at the time of the adoption of the Act of 1831 in order to elucidate its provisions", but his research apparently stopped with his own opinion written a year and a half earlier in Marshall v. Gordon, 243 U. S. 521, dealing with the power of congress to punish summarily for contempt. An analogy was drawn [fol. 157] between the powers of congress and the courts, and he asserted that each was based upon the "right of self preservation". This is the doctrine of "inherent necessity" in a new garb.

Regardless of the fact that judicial power had been limited by the Statute of 1831, the court had "no doubt that the provision conferred no power not already granted and imposed no limitations not already existing". This conclusion is palpably and demonstrably incorrect when considered in the light of the historical background in which

the federal statute was conceived. The federal courts, although by statute stripped of their power to punish contumacious editors, had transacted judicial business for almost a century without loss of either prestige or independence, yet Justice White said that freedom of the press "cannot be held to include the right virtually to destroy". The omission in the federal act of the tautological provision of the Pennsylvania act expressly abolishing contempts by publication, was considered by him to be "the strongest possible evidence of the purpose not to enact such provision". (For a searching criticism of the majority opinion, see Frankfurter and Landis: Power of Congress over Procedure in Criminal Contempts, 37 Harv. L. R. 1010.)

In California the first legislature expressly provided that the courts might punish for contempts. (Stats. 1850, chap. 33, sec. 13.) Under this statute the "power to punish in a summary manner, by fine or imprisonment, or either, for contempts offered to them while in session, or to any process, writ, rule, or order of said courts issued and made, or for disobeying any writ, process, or order thereof, or for obstructing or preventing the execution of the same, and the judgments, decrees, and determinations of said Courts in such cases shall be final and conclusive. * * *"

This statute was soon put to a test. Early in 1851 William Walker, the editor of the San Francisco "Herald", published an article referring to Judge Parsons with biting scorn. Also attacking the courts generally, the writer said: "They cover crime with the folds of the ermine; they lift their impotent arms to scourge an unfettered press with the rods of justice, as they style it. They drop the tears of a bastard mercy upon the robbers and the assassins who threaten our lives and our property; they turn with a scowl of wrath and an arm of vengeance upon the press which dares to complain of the tenderness with which offenders are treated."

Cited for contempt of court in summary proceedings, Walker was adjudged guilty, his punishment was fixed at a fine of five hundred dollars and he was ordered to stand committed until the same should be paid. In a written opinion Judge Parsons pointed out that the legislature had not defined "what shall or shall not be a contempt", and relying upon some statements of Chancellor Kent in People v. Freer, supra, he held that the power to punish summarily had existed in English and American courts "time out of

mind" and "is exercised * * * in all the states of the Union, unless a statute exists expressly taking away from the courts that power". (1 Cal. 542.)

Immediately upon his commitment, Walker memorialized the assembly of the legislature for the impeachment of Judge Parsons. A special committee submitted a report taking as precedents the Peck-Lawless and Respublica v. Oswald Cases and recommending impeachment. But the assembly refused to adopt the report, and appointed another special committee. The second committee found in early expressions of Chief Justice McKean of Pennsylvania and Chancellor Kent of New York, common law sanction for [fol. 158] the use of summary power and declared that section 13 of the District Court Act did not explicitly limit that power; hence "If there be fault anywhere, it is attributable to the obscurity of this section of the act, rather than to the interpretation put upon it by the court." The committee, therefore, concluded that Walker's charges "show no cause for impeachment" of Judge Parsons but was "induced to recommend the passage of a law, more explicitely defining contempts of court and the power of courts to punish them".

At the second session of the legislature, section 480 of the Practice Act was enacted. (Stats. 1851, chap. 5, tit. 13, p. 126.) In general, this section defined contempt of court as any misbehavior or breach of the peace in the presence of the court or its immediate vicinity which tends to interrupt the due course of trial or any disobediance of process. Section 1209 of the Code of Civil Procedure, enacted in 1872, adopted the Practice Act definition of contempt together with several additions to it. Official misconduct of judicial officers, abuse of process, acting as an officer of the court or attorney without authority or license, interference with jurors or witnesses, and disobedience of the order of a superior court by an inferior tribunal were brought within the summary power as was also "any other unlawful interference with the process or proceedings of a court". (Subd. 9.)

Not until 1890 did anyone challenge the application of this section to contempts by publication. At that time one Barry, who was editor of the San Francisco Weekly Star, published a particularly violent denunciation of Francis W. Lawler, a superior court judge, for sustaining a demurrer to a suit to oust a city supervisor from office. Barry was

found guilty of contempt in a summary proceeding before three other judges of the superior court. The Supreme Court denied his application for habeas corpus upon the ground that the editorial was an "unlawful interference with the proceedings of a court" within the meaning of subdivision 9 of section 1209 of the Code of Civil Procedure. (Ex parte Barry, 85 Cal. 603.)

Criticism of the decision soon appeared in several San Francisco newspapers. The Morning Call characterized the court as "accuser and judge" and argued that the accused should have been allowed a jury trial, as was then the practice of the federal courts in such cases. The San Francisco Evening Bulletin of September 13, 1890, stated in part, "The decision of the Supreme Court in the case of Editor Barry is exciting a great deal of unfavorable comment. Whether he libelled or not one of the Superior Judges cuts no figure in the case. The main fact is that he is to be punished without a hearing. * * *" In the San Francisco Chronicle of September 22, 1890, appeared an editorial which concluded: "All that can be done, if the Supreme Court adheres to its ruling in the Barry case, is to amend the statute by a negative clause, declaring that an attack upon the integrity of a judge made in the columns of a newspaper or other publication is not a contempt of court. If it come within the definition of a libel, the proprietor of the newspaper must stand the consequences. That is the responsibility which the Constitution and the law impose upon the newspaper, and which it cannot escape if it would; but to have its mouth closed thereafter, and to be precluded from making its defense before a jury, is not in harmony with either the spirit or the letter of the law, organic as well as statutory."

It is interesting to note that within a few months after this decision the legislature of 1891 amended section 1209 [fol. 159] of the Code of Civil Procedure by providing that "no speech or publication reflecting upon, or concerning any court, or any officer thereof, shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings". But this restriction upon the judicial power was soon declared unconstitutional. (In re Shortridge, 99 Cal. 526, 532.) The inherent necessity doctrine, said Justice Paterson, is "founded upon the principle—which is coeval with the exist-

ence of the courts, and as necessary to the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence". Admitting that the legislature had the right "to regulate the procedure and enlarge the power", the court also held that it could not "without trenching upon the constitutional powers of the court and destroying the autonomy of that system of checks and balances, which is one of the chief features of our triple department form of government, fetter the power itself".

To support the court's conclusions it cited only the Arkansas case of State v. Morrill, supra, which was said to be "in line with all of the authorities". But aside from the lack of precedent for the decision, it is entitled to no consideration in defining the law of contempt because the judgment against the offending editor was set aside upon the ground that, considering all of the facts, "the publication could not, under any circumstances, constitute a contempt". Yet in People v. Durrant, 116 Cal. 179, 209, it was cited for the obiter statement that a publication calculated to influence a decision is punishable as a contempt. Also the same dictum was quoted in Lamberson v. Super. Ct., 151 Cal. 458, 461; Paddon v. Super. Ct., 65 Cal. App. 34; and In re Mason, 69 Cal. App. 598, but in each of these cases the petitioner was charged with a direct contempt and no question concerning the constitutionality of that portion of section 1209 of the Code of Civil Procedure relating to contempts by publication was properly before the court. In the Lamberson case, the petitioner had filed a contumacious affidavit charging a judge with bias and lack of integrity. This, the court held, was a contempt committed in the presence of the court. The acts complained of in the Paddon and Mason cases were contempts of the same character, and were spoken of as having been done "in the face of the court". In the former, the petitioner refused to obey a subpoena and filed an affidavit in court stating his refusal; the contemner in the Mason case violated a court order.

In McClatchy v. Superior Court, 119 Cal. 413, it appears that the court was of the opinion that a false report of pending litigation was punishable as a contempt, but the order committing the alleged contemner was annulled upon the ground that he had not been given a fair hearing. However, In re Lindsley, 75 Cal. App. 122, and Lindsley v. Superior

Court, 76 Cal. App. 419, each hold that the publication of newspaper comment on pending litigation is a contempt of court punishable in a summary proceeding, although the question of the validity or applicability of subdivision 13 of section 1209 of the Code of Civil Procedure does not appear to have been raised and it was not discussed in either opinion. The first case cites 13 C. J. 34 to the effect that "it is a contempt to issue publications which are calculated to prejudice or prevent fair and impartial action in a cause [fol. 160] of judicial investigation then pending". The second case, which arose out of the same proceeding in the superior court, holds that a contempt under subdivision 9 of section 1209 was sufficiently proved.

The dictum of In re Shortridge, supra, was again quoted in Blodgett v. Superior Court, 210 Cal. 1, which is another case where the facts show that there was a direct contempt. In re Hallinan, 126 Cal. App. 121, is in the same category. The Shortridge case was there relied upon to sustain the trial court's power to punish an attorney who was guilty of disorderly conduct during the course of a trial.

In Ex parte Shuler, 210 Cal. 377, 397, and In re San Francisco Chronicle, 1 Cal. (2d) 630, this court for the first time directly held that the limitation upon the power of the courts to punish contemners by publication is unconstitutional. Little consideration was given to the subject in either opinion, the court relying entirely upon the dictum in the Shortridge case and the intervening cases which cited that case or quoted from it. However, mere reiterations of the doctrines of "inherent necessity" and "immemorial usage" are not authority for their validity.

The notion that contumacious publications have been subject to the summary power from time immemorial has been shown to be historically incorrect. Also, the experience of Pennsylvania and other jurisdictions where immunity of the press has long been maintained conclusively proves that no such power is necessary to maintain either the existence of or the respect for courts. It is not necessary to the wholesome administration of justice in this state that judicial officers have uncontrolled discretion in passing upon alleged constructive contempts of court. The opportunity for arbitrary punishment often provides the occasion for it. Noise, interruptions, violence of any kind in the course of judicial proceedings must be repressed, obedience to all lawful orders must be enforced. To uphold its authority

when challenged by such affronts to the judicial procedure, a court may and should summarily punish the offender. But indirect contempts, particularly publications in a newspaper, are entirely different in their nature and consequences.

The rights of freedom of speech and of the press have their roots deep in the soil of this nation's organic law. Five days before the Declaration of Independence was proclaimed, the patriots of Virginia declared in their Constitution: "Freedom of the press is the great bulwark of all liberty. None but a despotic government would attempt to restrain it. If it be restrained all liberty fails." For more than a century and a half our nation has consistently upheld this right of expression by a free people as a vital principle which the founders of our national and state governments stated in the respective constitutions as necessary to a democracy.

"Congress shall make no law . . . abridging the freedom of the press." (Art. I, U. S. Const.) The positive scope of this guarantee was stated by Mr. Justice Harlan in the celebrated case of Patterson v. Colorado, 205 U. S. 454,) as follows: "I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty * * * It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the [fols. 161-182] right to have a free press." Similarly our state Constitution ordains that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." (Art. I, sec. 9, Calif. Const.)

These provisions are binding upon the courts and no claims of judicial necessity can outweigh them. When free speech is fettered, liberty is a meaningless word.

The judgment should be annulled.

Edmonds, J.

[fol. 183] IN SUPREME COURT OF CALIFORNIA

Bank

San Francisco No. 16174

HARRY R. BRIDGES, Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent

On Review from the Superior Court in and for the County of Los Angeles

JUDGMENT—October 16, 1939

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been full considered, it is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby affirmed.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 16th day of October, 1939, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 24th day of November, A. D. 1939.

B. Grant Taylor, Clerk. By I. M. Johnson, Deputy.
(Seal) 11800.

[fol. 184] IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Nov. 13, 1939

By the Court

The Petition for a rehearing herein is denied. Edmonds, J., Curtis, J., and Gibson, J. voting for a rehearing.

Dated: November 9, 1939.

(Sig.) Waste, Chief Justice.

[File endorsement omitted.]

[fols. 185-186] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 187-188] In Supreme Court of The United States

Order Extending Time Within Which To Apply For Writ of Certiorari

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Now Here Ordered that the time within which Petition for Writ of Certiorari may be filed herein be, and the same is hereby extended for a period of 15 days from this date.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 9th day of February, 1940.

[fol. 189] In Supreme Court of The United States

Stipulation Re Printing Record Under Rule Thirty-eight (8), United States Supreme Court Rules—Filed February 20, 1940

It is Hereby Stipulated that the following may be omitted from the printed record:*

1. Petition for Writ of Review in Supreme Court of the State of California, including Pages I to XIII, and including Pages 1 to 37 thereof.

2. The following from affidavit of J. Louis Elkins, being Exhibit "A" attached to said Petition for Review:

(a) "First Count," being page 1, line 13, to page 4, line 20, of said Exhibit;

(b) "Third Count," being page 10, line 14, to page 14, line 14, of said Exhibit;

---

* All page references herein are to the typewritten Transcript.

[fol. 190] 3. Affidavit of A. G. Stanham and Exhibit attached thereto, said Exhibit being an affidavit of H. R. Bridges, both said affidavit of A. G. Stanham and said Exhibit being pages 57 to 73, inclusive, of Exhibit "A" attached to said Petition for Review.

4. The following from "Demurrer," being Exhibit "D":

(a) Page 1, line 15, to page 2, line 9;
(b) Page 2, line 21, to page 8, line 1;
(c) Page 8, line 6, to page 10, line 12.

5. Memo Opinion and Order attached to Petition for Review, being Exhibit "E" thereto; pages 1 to 24, inclusive.

6. The following from Answer of Harry R. Bridges, Exhibit "F", attached to said Petition, page 3, line 12, to page 5, line 26.

7. Exhibit "K".

8. Exhibit "L".

9. Verification to Petition, being page 195 of the Petition.

10. Memo of Points and Authorities, being page 196 to page 219, attached to said Petition.

It is Further Stipulated that in the event People's "Pro-Exhibit 1" and "Pro-Exhibit 2", attached to the Stipulation Amending Transcript is printed, only those portions thereof, as follows, shall be printed:

"Pro-Exhibit 1": that portion under the caption, "I. [fol. 191] L. A. files a suit on I. L. W. U. over Work".

"Pro-Exhibit 2": those portions under caption "Bridges Says Court Action Means Tie-up", consisting of two columns, up to the point in the second column reading, "John Barrymore to Play King Louis XV".

Dated this 15th day of February, 1940, at Los Angeles, California.

Gallagher, Wirin & Johnson; Gladstein, Grossman & Margolis; and Charles J. Katz, By A. L. Wirin, Attorneys for Petitioner.

J. H. O'Connor, County Counsel; Douglas De Coster, Chief Deputy County Counsel; S. V. O. Prichard, Deputy County Counsel; Allen W. Ashburn, Michael G. Luddy, and Arnold Praeger; by Michael G. Luddy, Attorneys for Respondent.

[fol. 192] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 8, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 759

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

A. L. WIRIN,
Counsel for Petitioner.

LEO GALLAGHER,
GROVER JOHNSON,
BEN MARGOLIS,
RICHARD GLADSTEIN,
AUBREY GROSSMAN,
CHARLES J. KATZ,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	2
Prayer for writ	5
Brief in support of petition for certiorari	7
Opinion of the court below	7
Jurisdiction	7
Statement of the case	8
Specification of errors	9
Summary of argument	10
Argument	11
Point 1	11
2	18
3	19
4	21
Conclusion	24
Appendix—Dissenting opinions in the case of *The Times Mirror Co. v. The Superior Court of the State of California*	25

Table of Cases Cited.

Abrams v. United States, 250 U. S. 616	16
Craig v. United States, 263 U. S. 353	4
DeJonge v. Oregon, 299 U. S. 353	16
Gitlow v. New York, 268 U. S. 652	3
Grosjean v. United States, 233 U. S. 604	24
Hague v. C. I. O., 307 U. S. 496	3
Herndon v. Lowry a, 301 U. S. 242	3
Hoyt v. Wise, 91 U. S. 308	24
Lovell v. Griffin, 303 U. S. 444	3
Meyer v. Nebraska, 262 U. S. 390	19
Michaelson v. United States, 261 U. S. 42	24
Near v. State, 207 Ind. 426	2, 13
Norris v. Alabama, 294 U. S. 587	21
Palko v. Connecticut, 302 U. S. 219	3

Page

Patterson v. *Colorado*, 205 U. S. 463 4
Pierre v. *Louisiana*, 306 U. S. 354 21
Reynolds v. *United States*, 98 U. S. 145 12
Schenck v. *United States*, 249 U. S. 52 2
Schneider v. *Irvington*, decided November 22, 1939, 60 Sup. Ct. Rep. 146, 84 L. Ed. Adv. op. 115 3, 8
State v. *American News*, 64 S. D. 385 2
Times-Mirror Publishing Co. v. *Superior Court*, 99 Cal. Dec. 108 2
Toledo Newspaper Co. v. *United States*, 247 U. S. 402 2, 4
Truax v. *Raich*, 239 U. S. 33 19
United States v. *Schwimmer*, 279 U. S. 644 17
Whitney v. *California*, 274 U. S. 357 3, 14

STATUTES CITED.

Constitution of the United States:
First Amendment 2
Fourteenth Amendment 2
Judicial Code, Sec. 237(b), as amended by Act of February 13, 1925, 43 Stat. 937 7

OTHER AUTHORITIES CITED.

1 Cooley, Constitutional Limitations (8th Ed.), pages 728, 729 18
2 Story, Commentaries on the Constitution (5th Ed.), Sections 1894-1895 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 759

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

Your petitioner Harry Bridges, respectfully alleges:

A.

Summary Statement of the Matter Involved.

The petitioner was adjudged guilty of contempt of court by the Superior Court of Los Angeles County, having been held liable by that court for the publication in the public press of the contents of a telegram to Frances Perkins, Secretary of Labor (R. 48-52). The telegram contained a vigorous and caustic criticism of a judgment of one of the judges of the Los Angeles Superior Court (R. 27).* The

* The text of the telegram, as well as the facts concerning its dispatch and publication, is set forth in the petitioner's brief in support of this petition (*infra*, p. 21-22).

petitioner was fined $125.00, and in the alternative, was given a jail sentence of five days in the Los Angeles County Jail. The judgment of conviction was affirmed by the court below, the Supreme Court of California.

The constitutional questions raised by this petition for a writ of certiorari are whether the petitioner has been deprived of freedom of speech, freedom of the press, the right to petition the government for a redress of grievances, and due process of law, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

B.

Reasons Relied On for the Allowance of the Writ.

At the bar of the courts of California, the petitioner urged that the judgment of conviction for contempt of court abridged his freedom of speech and freedom of the press by violating two standards applicable to free speech cases generally, and to contempt of court by publication, as well:

(1) the "actual obstruction" principle, first espoused by Justices Holmes and Brandeis, in dissent, in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, 422; adopted by the Supreme Courts of South Dakota and Indiana (in *State* v. *American News*, 64 S. D. 385, and *Nixon* v. *State*, 207 Ind. 426, respectively) and accepted by Justice Gibson, dissenting in the court below;* and

(2) the "clear and present danger" rule, first delineated by Justice Holmes in *Schenck* v. *U. S.*, 249 U. S. 52; in effect

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* Justice Phil Gibson did not participate in the decision of the court below in the case at bar, having been appointed a member of that court subsequent thereto. He did, however, take part in the consideration of the petition for re-hearing and was one of the three justices voting in favor of granting the petition, the court dividing 3 to 4 upon that issue (R. 177). Justice Gibson expressed his views in the instant case, on the occasion of the decision of the court below in *Times-Mirror Publishing Co.* v. *Superior Court*, 99 Cal. Dec. 108. For the convenience of the Court, Justice Gibson's dissent is attached as an exhibit to this petition (Appendix, pp. 26-34). The opinion of the court appears in the record, pages 136-161.

abandoned by this Court in *Gitlow* v. *New York*, 268 U. S. 652, over the dissenting protests of Justices Holmes and Brandeis; re-asserted by Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357; and, finally, readopted by this Court in *Herndon* v. *Lowrey*, 301 U. S. 242.

As applied to him, the petitioner contends that a standard of guilt upon a charge of contempt of court by publication, short of the "actual obstruction" principle, or the "clear and present danger" rule, denies due process; and that, particularly, both the "inherent tendency" view adopted by the trial court and the "reasonable tendency" test espoused by the Supreme Court of California, as applied to the petitioner upon the evidence adduced against him, fix such "vague and indeterminate boundaries" as to constitute a "dragnet which may inmesh anyone" exercising his constitutional right of freedom of speech, quite as much as did the "vague and indeterminate" standard announced by the Georgia courts, and rejected by this Court, in *Herndon* v. *Lowrey, supra.*

This petition brings to this tribunal for determination the principles of freedom of speech and of the press as applicable to the judiciary; and, particularly, these principles as applicable to constructive contempt by publication. In recent years, this Court in a series of decisions,* all marching along a broad main higl way and in the same direction—in the direction of the protection and extension of freedom of speech and freedom of the press—("the matrix, the indispensable condition of nearly every form of freedom"),** has stoutly upheld freedom of expression.

In these free speech cases, the issue was the constitutional limit to legislative and executive authority, when the legis-

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* *Herndon* v. *Lowrey*, 301 U. S. 242; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *Irvington*, November 22, 1939, 60 Sup. Ct. Rep. 146, 84 L. Ed. Adv. Op. 115

** Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 219.

lature and executive came into conflict with the right of the individual to freedom of expression.

It is, however, many years since this Court has had under consideration the constitutional limit, if any, to the authority of the judiciary, when the courts of the nation come into conflict with the rights of the people to free speech and a free press. The last time this Court dealt with the problem of constructive contempt by publication upon the merits was twenty-three years ago.* It is thirty-five years now since this Court reviewed a judgment of contempt by a State court.**

Since the consideration by this Court, of the applicable principles of free speech to publications affecting the judiciary, the State courts have expressed views and adopted standards that are hopelessly conflicting and irreconcilable, as disclosed by the adoption of the "actual obstruction" principle by the South Dakota and Indiana courts, on the one hand, and the adherence to the "tendency" doctrine by the court below in the instant and *Times* cases, on the other.***

Such conflict calls for clarification and authoritative determination by this Court.

In the recent free speech cases, this Court has taken pains to fix the boundaries of free speech, when such speech concerns political issues, so that he who undertakes to exercise such constitutional right now knows with reasonable certainty when he is running afoul of the law, and when the Constitution of the United States may no longer afford him a shield.

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* 1917, *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402; *Craig* v. *U. S.*, 263 U. S. 353, the latest decision was adjudicated on technical grounds, Justices Holmes and Brandeis dissenting.

** 1905, *Patterson* v. *Colorado*, 205 U. S. 463.

*** The Los Angeles *Times* publicly announced its intention to petition this Court for a Writ of Certiorari on the ground that its freedom of the press was abridged by the decision of the court below (L. A. *Times*, February 4, 1940).

Until, and unless, there is similar clarification by this Court upon the subject of contempt by publication, one who dares assert his constitutional right of freedom of expression upon an issue pending in the State courts, runs the risk of being "immeshed" by the "dragnet" of the "vague and indefinite boundaries" to such speech set up by the California courts.*

This petition raises important questions of Federal constitutional law, involving freedom of speech and of the press—rights which this Court has deemed "fundamental personal rights and liberties." **

The petitioner contends that if such characterization of those rights is not to be "an empty phrase", as affecting his freedom of speech, this Court should review the judgment of conviction of the petitioner for an alleged contempt of the Superior Court of Los Angeles County, which judgment of conviction the petitioner claims abridges his constitutional right to freedom of speech and of the press.

WHEREFORE, your petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming your petitioner's conviction for contempt, as aforesaid.

HARRY BRIDGES,
Petitioner.

By A. L. WIRIN,
Counsel for Petitioner.

LEO GALLAGHER,
GROVER JOHNSON.
BEN MARGOLIS,
RICHARD GLADSTEIN,
AUBREY GROSSMAN,
CHARLES J. KATZ,
Of Counsel.

* From Justice Roberts in the *Herndon* case.
** *Schneider* v. *Irvington, supra.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 759

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of California is reported in 98 Cal. Dec. 341, 94 Pac. (2d) 983.

II.

Jurisdiction.

1. Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237 b, as amended by Act of February 13, 1925, 43 Statutes 937.

2. Finality of Judgment.

The judgment forming the basis of the petition is final

both in form and substance and disposes of all the elements of the controversy in the court below.

3. Petition Timely Filed.

The final judgment of the Supreme Court of California was entered on November 24, 1939. Prior thereto the petitioner had timely filed a petition for re-hearing with the court below, which petition the court considered, and on November 13, 1939, denied; the order of the Supreme Court of California, affirming the judgment of the California trial court, adjudging the petitioner guilty of contempt of court by publication, was made October 16, 1939 (R. 177).

On February 9, 1940, Justice Stanley Reed, upon a Motion for Extension of Time Within Which to File a Petition for Writ of Certiorari, entered an order extending said time to February 24, 1940.

4. Judgment of the Highest Court.

The Supreme Court of the State of California is the highest California court.

5. Cases Sustaining Jurisdiction.

The following cases, among others, sustain the jurisdiction:

Schneider v. *Irvington*, U. S. Supreme Court, October Term, 1939, Nos. 11, 13, 18 and 29, decided November 22, 1939; 60 Sup. Ct. Rep. 146, 84 L. Ed. Adv. Op. 115; and cases cited therein.

III.

Statement of the Case.

A summary statement of the case has been given under heading "A" in the Petition for Writ of Certiorari, and is not repeated at this point. A fuller statement is set forth later (*infra*, p. 1-2).

IV.

Specification of Errors.

The petitioner assigns the following errors in the record and proceedings below:

The Supreme Court of California erred in its decision and judgment, in the following particulars:

(1) In ruling that the judgment of conviction of the petitioner for contempt of court by publication does not deprive the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States, by impairing the petitioner's right to freedom of speech and freedom of the press, as guaranteed by said due process clause; and particularly,

(a) in rejecting the "actual obstruction" principle

(b) in refusing to apply the "clear and present danger" rule, and

(c) in applying the "tendency" test; such latter test being "too vague and indefinite" to constitute an adequate standard of guilt.

(2) In ruling that the judgment of contempt does not deprive petitioner of due process of law, by denying to the petitioner the right to petition the government for a redress of grievances.

(3) In ruling that the contempt conviction does not deny the petitioner due process, by abridging his constitutional right to engage in a lawful occupation, to-wit: that of a labor union official.

(4) In ruling that the contempt judgment is supported by evidence sufficient to sustain a conviction. Such a ruling deprives the petitioner of liberty and property without due process of law.

V.

Summary of Argument.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The "actual obstruction" principle, and "clear and present danger" rule applied to publications alleged to be in contempt of court.

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the judgment of conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

VI.

ARGUMENT.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The "actual obstruction" principle, and "clear and present danger" rule applied to publications alleged to be in contempt of court.

The trial court adopted the "inherent tendency" rule and, applying it to the evidence, found the petitioner guilty of contempt (R. 156-159).

The Supreme Court of California, although asserting that it was rejecting that rule, in effect, adopted it. It merely changed its name to "reasonable tendency" test.

The Supreme Court of California expressly rejected two tests urged upon it by petitioner to be required by the constitutional guarantees of freedom of expression; namely, the "actual obstruction" principle and the "clear and present danger" rule.*

The classic criticism of the "tendency" doctrine, as a test of the legality and constitutionality of utterances in general, is contained in Jefferson's Virginia Statute on Religious Liberty:

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*The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the "inherent and dangerous tendency" rule (R. 158). This is incorrect. The petitioner urged *against* the adoption and application of such a rule on the ground that such a standard was too vague and indefinite and hence offends due process.

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all liberty, because he, being, of course, judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own."* (Italics ours.)

This point of view is substantially adopted by this Court in *Herndon* v. *Lowrey*, *supra*, in which the "dangerous tendency" view was rejected as "too vague and indefinite" a test, since such standard permitted punishment of the "fair use of the opportunity for expression of political opinion." A yardstick shorter than the "clear and present danger" rule, this Court ruled, "licenses the jury to create its own standard of guilt in each case," leaves the whole case to the pure "speculation" of a jury, and "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury." Such "vague and indeterminate boundaries," this Court held to constitute a "dragnet which may immesh anyone" who dared to exercise his constitutional right of freedom of speech.

The "tendency" doctrine is effectively refuted by Justice Gibson in the court below, dissenting in the *Times* cases referred to in the petition (Appendix, pp. 26-34):

> "The test adopted by the majority opinion is the *tendency* of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed *tendency* of the publication to affect and not its *actual effect* which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the *tendency alone* is con-

* Quoted by this Court, in *Reynolds* v. *U. S.*, 98 U. S. 145, 163.

sidered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect (italics ours).

"This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. * * *

"In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge."

Justice Gibson urged the adoption of the "actual obstruction" principles, quoting with approval from, and following, *State* v. *American News Co., supra.*

The views expressed by Justice Gibson are substantially those of Justices Holmes and Brandeis in their dissent in the *Toledo* case, in which those justices urged a reversal of a judgment of contempt on the ground that "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed."

Nixon v. *State*, 207 Ind. 426, is in accord.

(a) *The application of the "actual obstruction" principle to petitioner.*

There is no claim in the contempt charges against the petitioner, no evidence admitted in the course of the trial,

nor any finding by the trial court or the court below, of an "actual obstruction", or actual interference with the administration of justice. Both the trial court and the Supreme Court of California ruled that no such showing was necessary (R. 158-159).

The adoption and application by this Court of the "actual obstruction" principle would require a reversal of the judgment of conviction.

(b) *The "clear and present danger" rule, applied to publication alleged to be in contempt of court; and applied to the petitioner.*

First entering the mansions of the law in 1917*, the "clear and present danger" rule, became the law of the land in 1937.** Its classic and most comprehensive expression is by Justice Brandeis in his (and Justice Holmes') concurring opinion in *Whitney* v. *California*, 274 U. S. 357, Justice Brandeis declaring:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

The court below, however, expressly rejected this test as applicable to alleged contempt by publication and refused to apply the rule to petitioner (R. 156-159).

That the state (the government) has both the right and the duty to protect itself from destruction is beyond doubt. Yet the state, it is now determined by this Court, may not penalize utterances and publications "tending" to destroy the government; that the courts have the authority and the

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* *Schenck* v. *U. S., supra.*

** *Herndon* v. *Lowrey, supra.*

obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled; a fortiorari, the courts say not, without invading constitutional guarantees of freedom of speech and of the press, punish publications merely "tending" to obstruct, or tending improperly to influence, the courts.

Interferences with the judiciary admittedly constitute "substantive evils", which the courts may constitutionally penalize.

In dealing with evils the Congress of the United States and the legislatures of the states may penalize the expression of opinions, only when "there is a clear and present danger that they will bring about substantive evils."*

We are unable to apprehend any distinction, either in fact or in law, which would make the judiciary immune from these constitutional limitations, and authorize the courts to take steps in self-protection against interferences and embarrassments which the legislatures may not take to protect the state and federal governments from threatened destruction by force and violence.

In our opinion, the constitutional limitations upon legislative and executive authority apply with equal, if not greater, force against judicial exercise of the contempt power when that authority is asserted against mere utterance and publication.

The legislation considered by this Court in the cases in which the "clear and present danger" rule was evolved and formulated were all intended to protect the government: state criminal syndicalism acts, criminal anarchy laws, and sedition laws to preserve the state governments from destruction by force and violence; the federal Espionage Act, enacted by Congress to protect the federal government and its agencies from interference during the

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* *Schenck* v. *U. S., supra.*

great emergency of the World War. The judiciary constitutes one branch of our government; no matter how admittedly important or indispensable a part of that government, the courts have no greater power to protect themselves from interferences than the whole government has to preserve itself from destruction. The part can have no greater authority of self-protection than does the whole.

If this Court adopts and applies the "clear and present danger" rule to alleged contempts by publication, we suggest the following elements as essential to sustain a judgment of conviction for contempt:

(a) The publication must have come to the attention of the judge before whom the cause is pending.

(b) There must be evidence of, and a finding of, an express intent to influence the judge. Publication, *per se*, of an opinion concerning a pending case, addressed to the general public, constitutes an *exercise* of the right to freedom of the press; communication to the judge (whether successful or unsuccessful) constitutes the *abuse*, which may be penalized.

> "* * * Legislative intervention can find constitutional justification only by dealing with the *abuse*. The *rights* themselves must not be curtailed." *DeJonge* v. *Ore.*, 299 U. S. 353. (Italics ours.)

Judicial intervention should be measured by the same standard as legislative intervention.

> "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," (Justice Holmes, dissenting, in *Abrams* v. *U. S.*, 250 U. S. 616, 624)

should apply to the judges, as well as to the legislators.

(c) The contents of the publication must be such as would influence a judge of ordinary firmness and fortitude.

Applied to the instant case, the "clear and present danger" rule would require annulling the judgment of conviction and a ruling that the judgment abridges free speech, for the reasons that:

(a) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(b) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision." (R. 47).

(c) The contents of the telegram, although a vigorous and forthright protest against Judge Schmidt's decision, would not influence a judge or ordinary firmness and fortitude.

Freedom of speech includes [redacted] right to criticize.

> "* * * If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." (Justice Holmes, dissenting, in *U. S.* v. *Schwimmer,* 279 U. S. 644, 653.)

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

The right to send a telegram to the Secretary of Labor protesting against the decision of a local judge and the right to give publicity to such a telegram, is merely a manifestation of the right to petition the government for a redress of grievances.

This right is one of the oldest and one of the most universally accepted, of the common law political rights of Englishmen and Americans. It is specially incorporated in and guaranteed by the First Amendment.

2 Story, *Commentaries on the Constitution* (5th edition), Sections 1894-1895;

1 Cooley, *Constitutional Limitations* (8th edition), pages 728, 729.

There should be no doubt that it is guaranteed and protected by the Fourteenth Amendment. Certain it is that there is a widespread, and justified, belief that "neither liberty nor justice would exist if" it "were sacrificed".*

The petitioner, as a representative of the longshoremen's union manifestly believed that the union was aggrieved by the decision of the Los Angeles Superior Court; in communicating such grievance to the appropriate Federal governmental agency, to whom the Congress has delegated authority to seek to substitute industrial peace for threatened industrial disturbance, the petitioner was exercising the modern right of petitioning the government for a redress of grievances.

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* Justice Cardozo in *Palko* v. *Connecticut, supra.*

Such right to petition necessarily includes the right to do so *publicily*.

In its very essence, a petition to the government is a *public, not a private*, matter. It is necessarily a matter of public record. Suppression or concealment of petitions to the government would be contrary to the fundamental democratic principle upon which this very right is based. Going a step further, this prerogative is a basic element of a democratic form of government; such a form of government requires the conduct of *public* affairs *publicly*. Therefore to deny, that the right to *publish* a petition is inherent in and corrollary to the right to petition, is effectually to deny and nullify the right itself.

That there are limits to the exercise of this right, as to all rights, constitutional or otherwise, is not denied. In the absence of a showing of an express intent to influence or embarrass proceedings in a State court, however, punishment for the public exercise of the right to petition abridges that right, in definance of constitutional guarantees.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

The right of the petitioner to carry on his occupation as a labor union official is protected by the Fourteenth Amendment.

Meyer v. *Nebraska*, 262 U. S. 390, 399;
Truax v. *Raich*, 239 U. S. 33, 41.

The sending of a telegram by a union official to the United States Department of Labor protesting a decision of a State court and pointing out that its enforcement will result in a serious interference with interstate commerce is a reason-

able and necessary part of a union official's occupation protected as aforesaid.

If collective bargaining, and legitimate labor unions as the instruments for the effectuation of collective bargaining, are to continue to have the effective sanction of the law, labor union officers must be permitted and encouraged to function, not in a vacuum or in secrecy, but in the open and publicly. They should be protected in, and not penalized for, the exercise of their legitimate duties. If democracy in trade unionism is to be favored by the law, labor union officers should be encouraged to expose their every act, both to their constituents and to the general public through the instrumentality of the public press which reaches both.

The litigation in the *Walker* case was of great public interest. The possibility of a Pacific Coast waterfront tie-up resulting from Judge Schmidt's decision was of grave public concern. The public was entitled to know every legitimate step taken by the petitioner in behalf of the union and its thousands of members to avert the danger of such a tie-up; the petitioner in dispatching the telegram complained of to the Secretary of Labor and in publicizing its contents in the public press, if it is determined that he is responsible for such publication, was merely fulfilling his duty, both to his constituents and to the public.

To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby, is in effect to completely nullify the constitutional right to engage in that occupation at all.

A judgment which penalized the petitioner for a legitimate act in the exercise of his lawful occupation offends due process.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

This Court will review the evidence when a Federal right has been specially set up, and claimed in a State court.

Norris v. *Alabama*, 294 U. S. 587;
Pierre v. *Louisiana*, 306 U. S. 354.

The evidence which constitutes the basis of the petitioner's conviction is substantially as follows:

For some time prior to the dispatch of the telegram complained of, on March 24, 1938, there had been litigation in the Superior Court of Los Angeles County, entitled "*Walker* v. *I. L. A.*", No. 420356. One of the issues in that suit was the possession of the hiring hall maintained for the longshoremen of the San Pedro port, California. On March 21, 1939, after a trial upon the merits, the Superior Court, Judge Reuben Schmidt presiding, made and filed a permanent judgment and injunction by the terms of which a receiver was appointed to take possession of and to administer the hiring hall.

The telegram read as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held: decision now pending. Attempted enforcement of *Schmidt* decision will tie up port of Los Angeles and involve entire Pacific Coast. International Long-

> shoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen of the Pacific Coast, does not intend to allow State courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

The petitioner, under oath, at the trial disavowed any intention to influence the court. The trial judge, in his judgment at the time of imposition of sentence, found that the telegram was not sent by the petitioner "with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

Nor was there any evidence that the petitioner knew that, after the entry of judgment, the proceedings were still technically pending. On the contrary, he testified that he believed that with the entry of judgment the proceedings had terminated; and, further, that he had no knowledge of the pendency of motions for a new trial and to vacate the judgment (R. 116, 122-123). This testimony was uncontradicted. The motions were filed March 24, 1939. On January 22 an order was made by the trial judge staying proceedings in connection with the receivership order.

The uncontradicted evidence is that the petitioner dictated the telegram to his secretary; he did not, himself, release the contents to the press, nor did he instruct any person so to do (R. 114).

No instructions were given by the petitioner to his secretary, except that it be sent (R. 114). At the same time he dictated substantially the same telegram to the Chairman of the National Maritime Commission and the National Labor Relations Board (R. 109-110).

The petitioner testified that he had been requested, as an officers of a labor union, by the Department of Labor and other Federal agencies concerned with industrial peace, to advise such agencies of situations that endangered industrial peace (R. 110-112).

He further testified that the sole purpose for sending the telegrams to these governmental departments was to comply with such request and to advise these governmental agencies of a situation which, in his opinion, required the assistance of these Federal departments.

Pursuant to office routine, a copy of the telegram reached the desk of James D. O'Neil, the Public Relations Director of the C. I. O., who determined in his own judgment that the contents of the telegram were newsworthy, and who released the contents to the press (R. 102-103). This release was in accordance with the authority of Mr. O'Neil, as Public Relations Director, to determine what items were newsworthy (R. 100, 103-104, 115-116).

The release to the press was made by Mr. O'Neil without any instructions or communication from the petitioner (R. 104); nor did the petitioner have any conversation with Mr. O'Neil concerning the telegram or its release to the press (R. 103-104, 114).

There was no showing that either the dispatch of the telegram to the Secretary of Labor, or its publication in the public press, actually influenced Judge Schmidt, or any judge of the Los Angeles Superior Court, or had any actual effect upon the administration of justice in Los Angeles County.

Upon this evidence the trial court found

> (1) "That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto (thereof) to be given to one, James D. O'Neil, for the purpose and with the intent that the contents of the said telegram should, and would be furnished to and published in the newspapers on the Pacific Coast and elsewhere;" and
>
> (2) "That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves

calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the judge before whom said action was pending" (R. 51-52, 139).

A contempt proceeding is essentially criminal and penal in nature.

Gompers v. *U. S.*, 233 U. S. 604, 610;
Michaelson v. *U. S.*, 261 U. S. 42.

The sentence imposed upon the petitioner by the trial court was penal. He was fined and given a jail sentence, in the alternative.

The evidence against the petitioner discloses a failure of proof of personal participation in the *publication* of the telegram complained of.

A judgment of conviction of contempt in the absence of such participation in the offense denies due process.

Hoover v. *Wise*, 91 U. S. 308.

VII

Conclusion.

The Petition for a Writ of Certiorari should be granted.

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APPENDIX.

L. A. 16928. In Bank. January 31, 1940.

THE TIMES-MIRROR COMPANY (a Corporation) and L. D. HOTCHKISS, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent*.

L. A. No. 16929. In Bank. January 31, 1940.

THE TIMES-MIRROR COMPANY (a Corporation) and L. D. HOTCHKISS, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent*.

Dissenting Opinion of Edmonds, J.

In the case of *Bridges* v. *The Superior Court*, 98 Cal. Dec. 341, I stated at length the reasons for my opinion that section 1209 of the Code of Civil Procedure is constitutional and should be upheld. This statute, which was adopted almost fifty years ago and within a few months after a newspaper editor had been found guilty of contempt of court, declares the public policy of the people of this state in regard to publications relating to a judge which are not made in the immediate presence of a court while in session and in such manner as to actually interfere with judicial proceedings.

Whether persons should be allowed to write or speak about a court or judge under the conditions mentioned in the statute, without being subject to prosecution for contempt of court in summary proceedings, is a question upon which there will always be great difference of opinion. But it is not the province of a court to determine the policy which is most conducive to human welfare and governmental stability. That is the legislative function, and the judicial department may only determine whether the determination of the legislature violates a constitutional guarantee.

In my judgment, the opinions of this court in former cases where the statute was in question were written with more concern for upholding the inherent power of courts than for the constitutional guarantees of free speech and a free press. Yet the experience of New York and Pennsylvania, where laws similar to that of California have been in effect for over one hundred years, show that neither the existence of nor respect for courts has been seriously challenged by taking from judicial officers the uncontrolled right to pass upon alleged constructive contempts of court. Judicial necessity based upon the claim of inherent power is neither reason nor authority for setting aside a statute which expresses the policy of the people of this state concerning acts which might otherwise be punishable as constructive contempts.

For these reasons I believe that each of the judgments should be reversed.

EDMONDS, J.

Dissenting Opinion of Gibson, J.

I dissent. The law as laid down in the Bridges case is controlling in this jurisdiction on the power of a court to punish summarily for constructive contempt. But, as I did not participate in the Bridges case, and the question is before me for the first time, it seems appropriate to express my views thereon. I disagree with the conclusion reached in the Bridges case and in the majority opinion herein, and I concur in the views of Justice Edmonds, dissenting in each case.

The rules laid down in these cases do not give adequate recognition to or protection for the constitutional right of free speech and press, but instead sacrifice that fundamental right for a need which is fancied rather than real. The integrity and independence of the court is not the only matter to be considered. There is the equally important and equally fundamental need of fearless comment on all activities affecting the public welfare, including the operations of the courts. To preserve one basic right at the expense of another is a doubtful gain. And, as very clearly appears from this and other proceedings, the two rights

frequently come into conflict. When this happens, each must give way in some degree in order that a proper balance may be maintained, and both preserved. A court is usually most concerned with the immediate problem of safeguarding itself from outside influences during a pending proceeding; but in invoking drastic measures toward that end, it may do irreparable damage to the other fundamental right.

The assumption that to permit legislative regulation of the asserted inherent power of a court to punish summarily for constructive contempt would ultimately lead to its destruction, is without foundation.

There is doubtless some justification for this fear where direct contempts, those which actually interrupt the court proceedings, are involved; but constructive contempts do not demand the same prompt and summary action. Their effect is indirect and not immediately felt; their punishment can likewise be delayed without injury to the court's prestige or procedure. If the courts should actually be subjected to intimidation or other improper influences by persons immune from any punishment or restraint under the statute law, then the court could doubtless assert its power as an arm of the government in its own behalf. But no such situation has arisen either here or elsewhere, and I doubt whether it ever could arise in normal times. However desirable it might seem from the viewpoint of the court to have this power, it is not in fact necessary to enable it to function and it is both safe and consistent with democratic principles to leave the matter within the control of the legislature.

The experience of those few states which have acquiesced in the legislative regulation of the court's power to punish for constructive contempt is ample proof of the fact that the courts function just as well and safely under such regulation as they do where they are entirely free from it. We have seen no signs and have heard no charges of disrespect or impaired efficiency with regard to the courts of Pennsylvania, Kentucky, New York or South Carolina, where the inherent power doctrine is not followed. In our own state an example of peculiar inconsistency is found in the rule on disqualification of judges. If, as the ma-

jority opinion holds, the inherent power of the courts makes them immune from legislative interference, no regulation which limits that power can be valid. But we have upheld legislation which permits the challenge of a judge for bias or other disqualification in proceedings for constructive contempt. (See, *Briggs* v. *Superior Court,* 211 Cal. 619.)

There is a growing belief among thoughtful students of this problem that the solution is to eliminate summary punishment and make the offense subject to the usual rules of criminal trial. The court's integrity may be protected in the same manner as other rights of person and property and other institutions of government are protected. This is indeed, as Justice Edmonds shows, the historically correct position; the venture into summary punishment has been demonstrated to be both bad history and bad law. Today the security of the state and all of its departments, officers, and branches, except the judiciary, is protected from improper influences only by the general statute law enforceable by trial of the offender in the courts before a jury. We would, I am sure, be amazed at the suggestion that any other officer or body of government, executive or legislative, be given this potent power; yet to the intelligent observer who is not a judge of a court, the spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides, must seem equally amazing. The same observer might further reflect on the fact that matters having a purely hypothetical tendency to interfere with a judicial proceeding are conceived to require a more drastic system of suppression and punishment than overt acts of treason or rebellion striking at the very foundation of the government. In time we shall, I believe be brought to the conclusion that the normal course of trial is adequate and proper, and that either by a change in judicial viewpoint or by a constitutional amendment the legislative control will be recognized. (See, comments, 48 Yale L. J. 54; 7 Geo. Wash. L. Rev. 234, 241.)

But this point is for the present settled by the Bridges case, and must be accepted as the basis of decision in the instant case. Conceding the power, therefore, a problem of equal importance and perhaps greater difficulty arises in defining its scope. The test adopted by the majority

opinion is the tendency of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.

This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. As Mr. Chief Justice Taft said, concurring in *Craig* v. *Hecht*, 263 U. S. 255, 279: "* * * the delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest".

In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge. The present case furnishes us an excellent example of the confusion thus engendered. The Los Angeles Bar Association Committee, the trial judge and this court do not agree on the character of certain of the publications. The necessary result of such differences of opinion is to cause critics and commentators to limit or entirely forego their public function rather than to risk the

uncertainties of contempt charges by temperamental judges.

In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually interferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient. Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding. This attitude is well stated in Mr. Justice Holmes' dissenting opinion in *Toledo Newspaper Company* v. *United States*, 247 U. S. 402. And in the leading case of *State* v. *American News Company* (S. D.), 266 N. W. 827, 833, the court said: "We believe that any publication to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and obstructive in fact rather than in theory or by possibility. * * * We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said likely in point of actual fact to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unresricted freedom of speech rather than in the other direction."

It seems to me that if we are to accept the doctrine of summary punishment for constructive contempt, the extraordinary power thus created and applied in defiance of the legislative will should be used sparingly and cautiously. We should not ignore the growing suspicion that courts are prone to place their own security above all other considerations. We should recognize the importance, indeed, the vital necessity of the fullest comment and criticism in matters of public interest, and not seek to exempt the courts from such criticism. The course of reform in the judicial field itself depends in part upon a free and vigorous press which should not hesitate to condemn where it finds the actions of the court subject to condemnation, and the

editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead. In short, we must look frankly at the realities; we must remember that many factors consciously or unconsciously influence judges, and that some are accepted as normal or unavoidable. We should apply the summary power, if at all, only to those publications which appear to ordinary persons intended and calculated to work an unmistakable and unjustifiable influence upon a particular case.

In reading over the editorials adjudged contemptuous in the present proceedings, it is difficult to perceive the manner in which they were found to constitute an improper interference with the administration of justice. Not one of them appeared until the verdict of the jury had been rendered after the conclusion of the trial. It was not proved that they were intended to exercise a prejudicial influence on the judge, nor that he saw or read them. The asserted contempt is derived entirely from the supposed tendency of the language used. We should expect, therefore, to find in them some formidable threat or intimidation, or at least some demands on the judge for specific action, coupled with suggestions of reprisal if the demands go unheeded. But these writings are not of this character.

The first editorial "Sit-Strikers Convicted" commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the "most far reaching verdicts in the history of this country." There is certainly nothing in this editorial which should influence any judge in the performance of his duty.

The second editorial "The Fall of an Ex-Queen" is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a remote tendency to obstruct the administration of justice or to influence or embarrass any judge.

The third editorial is entitled "Probation for Gorillas?"

It is a denunciation of certain defendants found guilty of deadly assaults in connection with a labor dispute. It abounds with such scathing terms as "wrecking crew," "sluggers for pay" and "thugs"; it urges that an example be made of them, and adds: "Judge A. A. Scott will make a serious mistake if he grants probation" to these men. Now this is strong language, and the statement just quoted was ill advised and unfortunate, but it does not necessarily follow that it was contemptuous. The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the Superior Court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. It appears that the Times has blundered in following the example of a district attorney, and in taking the suggestion of a Superior Court judge, with reference to the propriety of commenting on judicial proceedings.

Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. The views expressed by the Times were those held and freely expressed by many others. The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; its readers will judge those for themselves. The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public and private comment on similar problems throughout his judicial life. In this group of impressions the present editorial, if actually seen and read, could hardly be said to occupy such a dominant place as to be obstructive or embarrassing.

And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character? Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes? The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial: a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community.

If the power over contempt is to be fairly and reasonably applied, two essential limitations on the test of constructive contempt must be recognized. First, it should be applied only to those publications of an unusual and abnormal character, those which to a layman are obviously improper and dangerous, because vindicative, threatening or inciting to violence. It should be inapplicable to comments of the usual, normal and expected type which the ordinary intelligent layman constantly meets with in the public press, the radio and informal discussion. Second, it should be applied only where it clearly appears that the publication was intended to reach the particular judge and was seen and read by him; and then only where it was of such a nature as to influence improperly a judge of ordinary firmness. We should assume that judges specially chosen for their important positions are capable of maintaining an impartiality and independence where others might weaken; we should realize that a judge of ordinary firmness should be a person of exceptional independence and integrity, immune from all but extraordinary influences.

Finally, in determining whether there is a tendency to obstruct justice, we should give due consideration to the stage of the case at which the publication occurs. When a period of relative finality is reached, as by the rendition of a jury's verdict, the dangers of outside influence have been reduced to a minimum, and comment thereafter should be freely permitted. At this stage, the newspapers must fulfill their proper function of criticism, and if they fail to comment when a matter is timely, they will be ignored

when their belated observations are eventually made. To say that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine. If the case is beyond the reach of discussion even after a jury's verdict, and until the final conclusion of proceedings for probation, new trial and appeal, there can never be anything of value in public discussion of such matters. In truth, both from the point of view of the law and practice, no such theory is followed. There are but few cases which hold that comment after a jury's verdict and before sentence or judgment on appeal is contemptuous. (See 48 Yale L. J. 54, 61.)

Viewed in retrospect, these contempt charges were a regrettable mistake. No evidence of actual interference with any legal proceeding was produced. Nothing in the editorials was intended or calculated to thwart the rendition of impartial justice in the matters then before the court. No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.

All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist.

The judgments should be reversed.

GIBSON, J.

IN THE

Supreme Court of the United States

October Term, 1940

No. 19

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF.

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SUBJECT INDEX.

PAGE

I.

Opinion Below 1

II.

Jurisdiction 2

1. Statutory provisions sustaining jurisdiction 2

III.

Statement of the Case 2

IV.

Specification of Errors 3

V.

Summary of Argument 4

VI.

Argument 5

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States 5

Only the application of the "clear and present danger" rule or the "actual obstruction" principle to publications alleged to be in contempt of court will reconcile the independence of the judiciary with freedom of the press 5

(a) The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, as applied, violate freedom of the press 5

PAGE

(b) The "clear and present danger" rule, applied to publication alleged to be in contempt of court; and applied to the petitioner 15

(1) The "clear and present danger" test 15

(2) The "clear and present danger" test applied to publications allegedly contemptuous 16

(3) The "clear and present danger" test applied to the petitioner 21

(c) The "actual obstruction" principle applied to publications alleged to be in contempt of court; and to the petitioner 22

(1) The "actual obstruction' principle applied to allegedly contemptuous publications 22

(2) The "actual obstruction" principle applied to the petitioner 24

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances 25

(a) The right to petition the government for a redress of grievances is guaranteed by the Fourteenth Amendment to the Constitution of the United States; it is therefore fundamental in its nature and should be liberally construed 25

(1) A petition to the government is a privileged communication and the privilege is forfeited only if express malice is established 26

(2) The publication in the press was unavoidable and was a necessary part of the petition itself 31

PAGE

(3) The right to petition for a redress of grievances by communicating with an appropriate federal agency, accordingly, includes the right to make said communication public..... 32

(4) The contempt conviction invades the authority of the federal government..... 33

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment..... 34

(a) Democratic unionism requires that union members be constantly informed of the activities of their leaders.... 34

(b) In a case such as this, where the public interest is involved, proper functioning of a union official requires that the public be informed of the steps taken by him to prevent a tie-up of commerce..... 35

(c) The right to pursue any calling or profession may not be unreasonably restricted or regulated..... 37

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies federal due process..... 38

Conclusion 39

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Abrams v. United States, 250 U. S. 616 18
Atkins v. Children's Hospital, 261 U. S. 525 12
Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473 27
Cantwell v. Connecticut, 310 U. S. 296 ..... 9, 16
Carlson v. California, 310 U. S. 106 16
Decker v. Gaylord, 35 Hunt. 584 (N. Y.), 42 Sup. Ct. Rep. (N. Y.) 27
DeJonge v. Oregon, 299 U. S. 353 ..... 18, 20
Gompers v. United States, 233 U. S. 604 38
Gray v. Pentland, 2 Serg. & R. 23 (Pa.) 27
Grosjean v. American Press, 297 U. S. 233 ..... 17, 18
Hague v. C. I. O., 307 U. S. 496 14
Hancock v. Mitchell, 98 S. E. 65, 83 W. Va. 156 27
Harris v. Huntington, 2 Tyler 129 (Vt.) 27
Harwood v. Keech, 4 Hunt. 389 (N. Y.) 27
Helvering v. Davis, 301 U. S. 619 12
Herndon v. Lowrey, 301 U. S. 242 ..... 7, 9, 11, 13, 15, 18
Hoover v. Wise, 91 U. S. 308 38
Howard v. Thompson, 21 Wend. 319 (N. Y.) 27
Keenan v. McMurray, 34 Pittsb. Leg. J. N. S. 223 (Pa.) 27
Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023 27
Lanzetta v. New Jersey, 306 U. S. 451 8
Legal Tender Cases, 12 Wall. 457 12
Lochner v. New York, 198 U. S. 45 13
Michaelson v. United States, 266 U. S. 42 38
Minersville School Dist. v. Walter Gobitis, U. S. Sup. Ct. 84 L. Ed. 993, 60 Sup. Ct. Rep. 1010 14
Mooney v. Holohan, 294 U. S. 103 13
Muller v. Oregon, 208 U. S. 412 13
Myer v. Nebraska, 262 U. S. 390 37
National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1 12
Near v. Minnesota, 283 U. S. 697 18

PAGE

Nixon v. State, 207 Ind. 426, 193 N. E. 591 23
Norris v. Alabama, 294 U. S. 587 ..... 13, 38
O'Donaghue v. M'Govern, 23 Wend. 26 (N. Y.) 27
Palko v. Connecticut, 302 U. S. 319 ..... 17, 26
Pierre v. Louisiana, 306 U. S. 354 38
Powell v. Alabama, 287 U. S. 45 13
Reid v. Delorme, 2 Brev. 76 (S. C.) 27
Reynolds v. United States, 98 U. S. 145 6
Schenck v. United States, 249 U. S. 47 ..... 15, 17
Scott, Dred, v. Sanford, 19 How. 393 12
Shields v. Commonwealth, 55 S. W. 881, 21 Ky. L. 1588 27
State v. American News Company, 64 S. D. 385 22
State v. Butterworth, 142 Atl. 57 (N. J.) 26
Thorn v. Blanchard, 5 Johns 507 (N. Y.) 26
Thornhill v. Alabama, 310 U. S. 88 ..... 9, 11, 14, 33, 35
Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 20, 22
Truax v. Raich, 239 U. S. 33 37
Tyree v. Harrison, 100 Va. 540, 42 S. E. 295 27
United States v. Schwimmer, 279 U. S. 644 21
White v. Nicholls, 3 How. 266, 11 L. Ed. 591 27
Whitney v. California, 274 U. S. 357 ..... 15, 17, 18
Young v. Richardson, 4 Ill. App. 364 27

STATUTES.

Judicial Code, Sec. 237b, as amended by Act of Feb. 13, 1925 (43 Stats. 937) 2

TEXTBOOKS.

1 Cooley, Constitutional Limitations (8th Ed.), pp. 728-729 25
2 Story, Commentaries on the Constitution (5th Ed.), Secs. 1894-1895 25
Theodore Schroeder, "Constitutional Free Speech," p. 395 6

IN THE

Supreme Court of the United States

October Term, 1940

No. 19

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF.

I.

Opinion Below.

The opinion [R. 136] of the Supreme Court of California is reported in 14 Cal. (2d) 464, 94 Pac. (2d) 983.[1]

[1]Chief Justice Phil Gibson did not participate in the decision of the court below in the case at bar, having been appointed a member of that court subsequent thereto. He did, however, take part in the consideration of the petition for re-hearing and was one of the three justices voting in favor of granting the petition, the court dividing 3 to 4 upon that issue [R. 177]. Justice Gibson expressed his views in the instant case, on the occasion of the decision of the court below in *Times-Mirror Publishing Co. v. Superior Court*, 15 Cal. (2d) 99, 122, pending before this court on certiorari, October term, 1940, No. 64.

II.

Jurisdiction.

1. STATUTORY PROVISIONS SUSTAINING JURISDICTION.

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237 b, as amended by Act of February 13, 1925 (43 Statutes 937).

III.

Statement of the Case.

The petitioner was adjudged guilty of contempt of court by the Superior Court of Los Angeles County, having been held liable by that court for the publication in the public press of the contents of a telegram to Frances Perkins, Secretary of Labor [R. 48-52]. The telegram contained a vigorous and caustic criticism of a judgment of one of the judges of the Los Angeles Superior Court [R. 27].[2] The petitioner was fined $125.00 and in the alternative, was given a jail sentence of five days in the Los Angeles County Jail. The judgment of conviction was affirmed by the Supreme Court of California.

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[2]The text of the telegram, as well as the facts concerning its dispatch and publication, is set forth in the petitioner's brief later (*infra* pp. 28-29).

IV.

Specification of Errors.

The petitioner assigns the following errors in the record and proceedings below:

The Supreme Court of California erred in its decision and judgment, in the following particulars:

(1) In ruling that the judgment of conviction of the petitioner for contempt of court by publication does not deprive the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States, by impairing the petitioner's right to freedom of speech and freedom of the press, as guaranteed by said due process clause; and particularly,

(a) in rejecting the "actual obstruction" principle

(b) in refusing to apply the "clear and present danger" rule, and

(c) in applying the "tendency" test; such latter test being "too vague and indefinite" to constitute an adequate standard of guilt.

(2) In ruling that the judgment of contempt does not deprive petitioner of due process of law, by denying to the petitioner the right to petition the government for a redress of grievances.

(3) In ruling that the contempt conviction does not deny the petitioner due process, by abridging his constitutional right to engage in a lawful occupation, to-wit: that of a labor union official.

(4) In ruling that the contempt judgment is supported by evidence sufficient to sustain a conviction.

V.

Summary of Argument.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Only the application of either the "clear and present danger" rule or the "actual obstruction" principle to publications alleged to be in contempt of court will reconcile the independence of the judiciary with freedom of the press.

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the judgment of conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

VI.

Argument.

Point 1.

The "Inherent Tendency" and "Reasonable Tendency" Tests, Applied by the California Courts to Publication Pertaining to Issues Pending in the Courts, Are Too Vague and Indefinite; as Such They Offend Due Process of Law and Deprive the Petitioner of Freedom of Speech and Freedom of the Press, as Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Only the Application of the "Clear and Present Danger" Rule or the "Actual Obstruction" Principle to Publications Alleged to Be in Contempt of Court Will Reconcile the Independence of the Judiciary With Freedom of the Press.

(a) THE "INHERENT TENDENCY" AND "REASONABLE TENDENCY" TESTS, APPLIED BY THE CALIFORNIA COURTS TO PUBLICATION PERTAINING TO ISSUES PENDING IN THE COURTS, AS APPLIED, VIOLATE FREEDOM OF THE PRESS.

The classic criticism of the "tendency" doctrine, as a test of the legality and constitutionality of utterances in general, is contained in Jefferson's Virginia Statute on Religious Liberty:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all . . . liberty, because he, being, of course, judge of that tendency, will

> make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own." (Italics ours.)[3]

Many Americans, from Thomas Jefferson to the Justices of this Court have protested the utter inadequacy of the "dangerous tendency" test; statesmen and jurists alike have joined for many generations in the search for a standard of guilt, in cases involving speech, less "vague and indeterminate" than one that lodges unregulated and limitless power, without any objective criteria, in a single judge, to determine what the people may, or may not, speak.

Of the founding fathers, Jefferson was not alone in rejecting the doctrine; James Madison joined with him. Nor were they first in condemning it. On the contrary, they were but the heirs of a great tradition of freedom from persecution for the mere expression of opinion—a tradition built by the great thinkers, philosophers and statesmen of many lands and through the ages, all of whom have insisted on some accompanying overt act or actual injury, or some proximate relationship between word and deed, to justify punishment for utterance or publication. Among them may be listed:[4]

St. Hilary, A. D. 335; Theodosian (in Theodosian Code) 438; Martin Luther, 1535; John Milton, 1644; Jeremy Taylor, 1647; Edward Bagshaw, 1660; John Owen, 1667; John Locke, 1667; Thos. Delaune, 1683; Hubert Languet, 1579; Roger Williams, 1630; John Wy-

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[3]Quoted with approval in part by this Court in *Reynolds v. U. S.* 98 U. S. 145, 163.

[4]From Theodore Schroeder, "Constitutional Free Speech," p. 395.

cliffe, 1729; Charles Montesquieu, 1748; The Bishop of St. Davids, 1763; Robert Norris, 1770; Jeremy Bentham, 1776; Tunis Wortman, 1800.

This Jeffersonian point of view is substantially adopted by this Court, in *Herndon v. Lowrey*, 301 U. S. 242, in which the "dangerous tendency" view was rejected as "too vague and indefinite" a test, since such standard permitted punishment of the "fair use of the opportunity for expression of political opinion." It "licenses the jury to create its own standard of guilt in each case," leaves the whole case to the pure "speculation" of a jury, and "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury." Such "vague and indeterminate boundaries," this Court held to constitute a "dragnet which may immesh anyone" who dares to exercise his constitutional right of freedom of speech.

The "tendency" doctrine is effectively refuted in addition by Chief Justice Gibson in the court below, dissenting in the *Times* cases:[5]

> "The test adopted by the majority opinion is the *tendency* of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed *tendency* of the publication to affect and not its *actual effect* which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the *tendency alone* is considered. Denial by the judge

[5] 15 Cal. (2d) 99, 122. Record in *Times-Mirror Co. v. Superior Court*, October term, 1940, No. 64, p. 140.

that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect (italics ours).

"This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences.

"In the second place the test permits the placing of restraints on speech and press as varied as the sensitives of a particular judge."

This view is in accord with the understanding by judges and lawyers of the conventional concept of "due process of law" in all criminal prosecutions: that the standard of guilt be sufficiently fixed, clear and certain, so that the average person may, upon the exercise of reasonable intelligence and circumspection, know when he is violating the law.[6]

This statement of the law, moreover, is in accord with the view of this Court announced, since the decisions in

[6] *Cf. Lanzetta v. New Jersey*, 306 U. S. 451.

the instant and in the *Times* cases by the court below, to the effect that state action limiting freedom of expression upon a formula "sweeping within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech and of the press," violates due process. Such a general, sweeping and indeterminate formula "readily lends itself to harsh and discriminatory enforcement by the local prosecuting officials against particular groups deemed to merit their displeasure," and "results in a continuous and pervasive restraint on all freedom of discussion."[7]

The conviction of the petitioner is "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."[8]

Every argument and criticism directed against the "dangerous tendency" tenet as an inadequate and unconstitutional criterion to determine the legality of political utterances, apply with even greater force to discussions in the public press, of matters pending in the courts.

If as a criterion of guilt the "dangerous tendency" creed is invalid under the Constitution because it is too vague, uncertain, and indeterminate, as applied to political expression generally; if, further, the doctrine "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury,"[9] *a fortiorari*, such a dogma must be rejected when that test is administered by a judge alone, without a jury.

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[7]Justice Murphy in *Thornhill v. Alabama*, 310 U. S. 88.

[8]*Cantwell v. Connecticut*, 310 U. S. 296, 308.

[9]Justice Roberts in *Herndon v. Lowery*, *supra*.

The frequent criticism directed both by lawyers and judicial scholars against the courts because of their alleged abuse of authority in administering the delicate but potent contempt power is well known; frequently, the alleged contempt consists of a critical reference to the judiciary so as to arouse strong feeling on the part of the judge; often the same judge who has deemed himself affronted or his dignity wounded, acts as prosecutor as well as judge; in any event, any judge who may be presiding over the "summary" hearing approaches the problem with a strong, if perhaps often subconscious, feeling of loyalty to the fraternity of judges, as well as determination to uphold the "integrity" of the courts.

Denied the right to "put himself upon his country," by a trial by a jury[9a] of common folk who might be expected to take a "common sense" view of the authority of the courts and the rights of the people, prosecuted either by the judge who will "summarily" determine in favor of the wisdom and legality of the prosecution, or by private zealots, as in the instant case, bent upon vindicating the "dignity" of the judiciary, what chance has a defendant, whose guilt is determined in terms of the vague contours of the "dangerous and inherent tendency" formula? Certainly Thomas Jefferson's protest that such a rule destroys all liberty in that the magistrate, "being the judge of that tendency, will make his opinions the rule of judgment," applies to the judge who sets out to right the wrongs committed against the judiciary.

How are newspaper publishers, editors, reporters and labor leaders, assuming that they are persons of average

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[9a]The California court ruled that the petitioner was not entitled to a jury trial.

intelligence, to divine at which point the exercise of their liberty of the press is metamorphosed into criminal conduct, when the measuring-rod contracts and expands dependent upon the self-restraint or vindictiveness of the particular judge who may be sitting in judgment?

Is a standard of guilt so vague and indeterminate, anything other than a "dragnet"[10] to enmesh any newspaper publication or trade union utterance which offends any judge or magistrate?

Does this formula, applied to alleged contempts by publications, not "readily lend itself to harsh and discriminatory enforcement," and thus result "in a continuous and pervasive restraint on all freedom of discussion"[11] pertaining to every issue that may be pending in any court?

For yet another reason is the "tendency" doctrine an inadequate and impractical test.

In a constitutional democracy, the courts are both the appropriate, and inevitably the final, arbiters of all the great current controversial issues of the day. At the heart of a democracy is the right of the people, through the press and through every other method of communication of opinion, to discuss those issues. To curb such expression of opinion, merely because such discussion may have a "tendency" to "embarrass" or influence a judge somewhere before whom there may be pending litigation involving one of those issues, abridges, if it does not nullify, the right of public discussion. The ever present threat of punishment for contempt of court for publications having that "tendency" would constitute an effective

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[10]From Justice Roberts in *Herndon v. Lowery, supra.*

[11]From Justice Murphy in *Thornhill v. Alabama, supra.*

restraint upon such expression of opinion at all times upon every public issue.

Examples of great issues pending for many years in the courts come readily to mind—slavery,[12] legal-tender,[13] child labor legislation,[14] social security enactments,[15] labor legislation[16]—all find their way for arbitrament ultimately in the judicial forum. To restrain discussion of such problems, while they wend their way leisurely through the courts, is to deny the people the right to engage in public discussion upon the live and important issues of the time—the only issues that matter.

The "tendency" rule, moreover, if enforced, would actually impede the administration of justice; for it would make it difficult, if not impossible, for minority groups adequately to seek redress in the courts. Particularly would the weak, the unpopular and the helpless in the community—to whose rescue this court has come so frequently in recent months—continue to remain defenseless. Here again, instances are legion.

The "tendency" formula would have made it impossible for millions of Americans, first to know about, and then to interest themselves in the fate of Tom Mooney. But for such widespread and articulate concern in Mooney, he would not be alive today. That case was "pending" in one court or another for over twenty years. Without the right to discuss the guilt or innocence of Mooney, the

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[12] *Dred Scott v. Sanford*, 19 How. 393.

[13] *Legal Tender Cases*, 12 Wall. 457.

[14] *Atkins v. Children's Hospital*, 261 U. S. 525.

[15] *Helvering v. Davis*, 301 U. S. 619.

[16] *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1.

American Civil Liberties Union and other cooperating organizations would have been prevented from collecting sufficient funds to bring the case to the attention of this court,[17] or otherwise to finance the defense through the many other court proceedings.

The rule would, moreover, have doomed to death the Scottsboro boys,[18] as well as other defenseless Negroes saved from the hangman's noose by this court: for it would have impeded the activities of the National Association for the Advancement of Colored People and other groups who found it necessary to, and did, discuss the "merits of the case" while appeals were pending in the courts.

Similarly, Angelo Herndon[19] would now be serving his 18 to 20 year sentence upon a Georgia chain gang, and this court would never have had an opportunity to intervene in his behalf, were it not for the International Labor Defense; and that organization, in turn, would have been unable to arouse sufficient public interest in the innocence of Herndon, and thus raise the necessary funds to pay for the expense of an appeal to this court, if subject to the "pervasive restraint" of a conviction for contempt because of publications "tending" to influence the administration of justice in Alabama.

Indeed, it may be said that *Lochner v. New York*, 198 U. S. 45, and not *Muller v. Oregon*, 208 U. S. 412, would be the law today were such a rule in effect: for the National Consumers League would have found it impossible

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[17] *Cf. Mooney v. Holohan*, 294 U. S. 103. Mooney was pardoned by the present Governor of California.

[18] *Powell v. Alabama*, 287 U. S. 45; *Norris v. Alabama*, 294 U. S. 587.

[19] *Herndon v. Lowrey, supra.*

to function effectively were its right to discuss the merits of maximum hour legislation impeded by the threat of such a rule of contempt of court.

Without the right to discuss causes pending in the courts, free from the threat of prosecution for contempt, it would have been impractical for the American Bar Association, through its Bill of Rights Committee, to have reached its thousands of members scattered throughout the United States in order to receive permission to appear as a friend of this Court in the *Hague* and *Gobitis* cases.[20]

Finally, neither the American Federation of Labor, nor the Congress of Industrial Organizations would have been able to bring to this Court *Thornhill v. Alabama* and *Carson v. California, supra*, if it is the law that discussion among members of a labor union of the nature of the right to picket is outlawed because of the remote and speculative "tendency" of such discussion to embarrass or to influence some judge somewhere who may have that constitutional issue under consideration.

A rule which thus proscribes the expression of opinion strikes a foul, if not fatal, blow at the democratic, and American, way of life.

The trial court below adopted the "inherent tendency" rule and, applying it to the evidence, found the petitioner guilty of contempt [R. 156-159].

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[20]*Hague v. C. I. O.* (1939), 307 U. S. 496; *Minersville School Dist. v. Walter Gobitis*, U. S. Supreme Court, 84 L. Ed. 993, 60 Sup. Ct. Rep. 1010.

The Supreme Court of California, although asserting that it was rejecting that rule, in effect, adopted it. It merely changed its name to "reasonable tendency" test.[21]

This test, as applied by the California Supreme Court to the petitioner, abridged his freedom of speech and of the press.

(b) THE "CLEAR AND PRESENT DANGER" RULE, APPLIED TO PUBLICATION ALLEGED TO BE IN CONTEMPT OF COURT; AND APPLIED TO THE PETITIONER.

(1) *The "Clear and Present Danger" Test.*

First entering the mansions of the law in 1917,[22] the "clear and present danger" rule, became the law of the land in 1937.[23] Its classic and most comprehensive expression is by Justice Brandeis in his (and Justice Holmes') concurring opinion in *Whitney v. California*, 274 U. S. 357, Justice Brandeis declaring:

> "That the necessity which is essential to valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

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[21]The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the "inherent and dangerous tendency" rule [R. 158]. This is incorrect. The petitioner urged *against* the adoption and application of such a formula.

[22]*Schenck v. U. S.*, 249 U. S. 47, at 52.

[23]*Herndon v. Lowrey, supra.*

In the last term of this Court the rule was expounded and extended by the Court, by both Justices Murphy and Roberts.[24]

The court below, however, expressly rejected this test as applicable to alleged contempt by publication and refused to apply the rule to petitioner [R. 156-159].

(2) The "Clear and Present Danger" Test Applied to Publications Allegedly Contemptuous.

That the state (the government) has both the right and the duty to protect itself from destruction is beyond doubt. Yet the state, it is now authoritatively adjudicated, may not penalize uterances and publications "tending" to destroy the government.

That the courts have the authority and the obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled; *a fortiorari*, the courts may not, without invading constitutional guarantees of freedom of speech and of the press, punish publications "tending" to, or having the "inherent tendency" to obstruct, interfere with, or improperly to influence the courts.

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[24] Justice Murphy in *Carlson v. California*, 310 U. S. 106, 113:

"But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control."

Justice Roberts in *Cantwell v. Connecticut*, 310 U. S. 296, 308:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appear, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Interferences with the judiciary admittedly constitute "substantive evils," which the courts may constitutionally prevent by appropriate measures. In dealing with such evils the Congress of the United States may penalize the expression of opinions, only when "there is a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[25] The states in enacting legislation designed to curb serious evils, may not constitutionally restrict utterances "unless speech would produce, or is intended to produce a clear and present danger of some substantive evil which the state constitutionally may prevent.[26]

We are unable to apprehend any distinction, either in fact or in law, which would make the judiciary immune from constitutional limitations, and authorize the courts to take steps in self-protection against interferences and embarrassments which the legislatures may not take to protect the state and federal governments from threatened destruction by force and violence.

The legislatures, it is conclusively determined, must recognize freedom of speech and of thought as "the matrix, the indispensible condition of nearly every other freedom . . . without which neither liberty nor justice would exist;"[27] encroachment upon that right by state legislation "violates those fundamental principles of liberty and justice that lie at the base of all civil and political institutions;"[28] the legislative department of our three-branch system of government must recognize that

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[25]*Schenck v. United States, supra.*

[26]*Whitney v. California, supra.*

[27]*Palko v. Connecticut*, 302 U. S. 319.

[28]*Grosjean v. American Press*, 297 U. S. 233.

"the ultimate good is better reached in free trade in ideas;"[29] and state authorities must "eschew silence coerced by law—the argument of force in its worst form,"[30].

Are not the judges bound by the same constitutional principles, guarantees and limitations?

The states have been enjoined in devising ways to prevent serious evils, to remember Blackstone ("the liberty of the press is indeed essential to the nature of a free state") and Madison ("to the press alone the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression");[31] and ever to bear in mind that "a free press stands as one of the great interpreters between the government and its people. To allow it to be fettered is to fetter ourselves."[32]

Further, "legislative intervention can find constitutional justification only by dealing with the abuse of speech;"[33] before a state may penalize even utterances of a defined character there must first appear "a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."[34]

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[29] *Abrams v. United States*, 250 U. S. 616.

[30] *Whitney v. California*, *supra*.

[31] *Near v. Minnesota*, 283 U. S. 697.

[32] *Grosjean v. American Press Co.*, *supra*.

[33] *DeJonge v. Oregon*, 299 U. S. 353.

[34] *Herndon v. Lowrey*, *supra*.

These constitutional limitations upon legislative and executive authority apply with equal, if not greater, force against judicial exercise of the contempt power when that authority is asserted against mere utterance and publication.

The legislation considered by this Court in the cases in which the "clear and present danger" rule was evolved and formulated were all intended to protect the government: state criminal syndicalism acts, criminal anarchy laws, and sedition laws to preserve the state governments from destruction by force and violence; the federal Espionage Act, enacted by Congress to protect the federal government and its agencies from interference during the great emergency of the World War. The judiciary constitutes one branch of our government; no matter how admittedly important or indispensable a part of that government, the courts have no greater power to protect themselves from interferences than the whole government has to preserve itself from destruction. The part can have no greater authority of self-protection than does the whole.

If this Court adopts and applies the "clear and present danger" rule to alleged contempts by publication, we suggest the following elements as essential to sustain a judgment of conviction for contempt:

(A) The publication must have come to the attention of the judge before whom the cause is pending.

(B) There must be evidence of, and a finding of, an express intent to influence the judge. Publication, *per se*,

of an opinion concerning a pending case, addressed to the general public, constitutes an *exercise* of the right to freedom of the press; communication to the judge (whether successful or unsuccessful) constitutes the *abuse*, which may be penalized.

> ". . . Legislative intervention can find constitutional justification only by dealing with the *abuse*. The *rights* themselves must not be curtailed." *DeJonge v. Ore.*, 299 U. S. 353 at 364. (Italics ours.)

Judicial intervention should be measured by the same standard as legislative invasion.

> ". . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," Justice Holmes, dissenting, in *Abrams v. U. S.*, 250 U. S. 616, 630,"

should apply to the judges, as well as to the legislators.

(C) The contents of the publication must be such as would influence a judge of ordinary firmness and "fortitude."[35]

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[35]Justice Holmes, dissenting in *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 422.

(3) The "Clear and Present Danger" Test Applied to the Petitioner.

Applied to the instant case, the "clear and present danger" rule would require annulling the judgment of conviction and a ruling that the judgment abridges free speech, for the reasons that:

(A) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(B) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California, but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision." [R. 47.]

(C) The contents of the telegram, although a vigorous and forthright protest against Judge Schmidt's decision, would not influence a judge of ordinary firmness and fortitude.

Freedom of speech includes the right to criticize.

> ". . . If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." (Justice Holmes, dissenting, in *U. S. v. Schwimmer*, 279 U. S. 644, 654.)

(c) THE "ACTUAL OBSTRUCTION" PRINCIPLE APPLIED TO PUBLICATIONS ALLEGED TO BE IN CONTEMPT OF COURT; AND TO THE PETITIONER.

(1) *The "Actual Obstruction" Principle Applied to Allegedly Contemptuous Publications.*

It was Justice Holmes who, with Justice Brandeis, fathered the "actual obstruction" principle as applied to contempt by publication.

Dissenting (with Justice Brandeis) in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 422, he asserted that an *actual* obstruction of justice was necessary in order to support a conviction for contempt of court based upon discussion of a pending case.

Justice Holmes could not find any evidence in the case that there was "anything that obstructed the administration of justice in any sense" that he could possibly give to those words.

Because in his opinion "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed" he joined with Justice Brandeis in urging the reversal of the conviction.

Two liberal state courts have adopted the Holmes-Brandeis view. Thus, the Supreme Court of South Dakota, in *State v. American News Company*, 64 S. D. 385, at 397, ruled: "that any publication, to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and *obstructive* in fact rather than in theory or by possibility." (Italics ours.)

We quote further from the opinion (at 398):

". . . We believe that in all contempt cases the distinction should be borne in mind throughout between a merely defamatory publication and an *actually obstructive publication*. We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said likely in point of *actual fact* to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction . . ." (Italics ours.)

Similarly, the Supreme Court of Indiana is in accord with the requirement that an actual interference with the Courts is necessary to support a conviction for contempt of Court by publication.

That Court decided in *Nixon v. State*, 207 Ind. 426, at 440, 193 N. E. 591:

"The right to freely comment and criticize the action, opinions, and judgments of courts is of primary importance to the public generally. It is not only good for the public, but has a salutary effect upon the courts and judges as well. Courts and judges are not and should not be above criticism, and as long as they are not impeded in the conduct of judicial business by publications having the direct tendency and *effect* of obstructing the enforcement of

their orders and judgments, or of impairing the justice and impartiality of verdicts, there is no right to enforce a contempt proceeding.

"We do not think it is the policy of the law to unduly extend the doctrine of contempt proceedings as applied to publications claimed to impede, interfere with, or embarrass the administration of justice. It must clearly appear that such publications *do* impede, interfere with, and embarrass the administration of justice before the author of the publication should be held for contempt." (Italics ours.)

This actual obstruction test was in effect adopted by Chief Justice Gibson dissenting below.

(2) The "Actual Obstruction" Principle Applied to the Petitioner.

There is no claim in the contempt charges against the petitioner, no evidence, admitted in the course of the trial, nor any finding by the trial court of the court below, of an "actual obstruction," or actual interference with the administration of justice. Both the trial court and the Supreme Court of California ruled that no such showing was necessary [R. 158-159].

The adoption and application by this Court of the "actual obstruction" principle accordingly would require a reversal of the conviction of the petitioner.

Point 2.

The Petitioner Was Deprived of Due Process of Law and Freedom of Speech and of the Press, in That the Conviction of Contempt of Court Denied the Petitioner the Right to Petition the Government for a Redress of Grievances.

(a) THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; IT IS THEREFORE FUNDAMENTAL IN ITS NATURE AND SHOULD BE LIBERALLY CONSTRUED.

The right to send a telegram to the Secretary of Labor protesting against the decision of a local judge and the right to give publicity to such a telegram, is merely a manifestation of the right to petition the government for a redress of grievances.

This right is one of the oldest and one of the most universally accepted, of the common law political rights of Englishmen and Americans. It is specially incorporated in and guaranteed by the First Amendment.

2 Story, *Commentaries on the Constitution* (5th edition), Sections 1894-1895;

1 Cooley, *Constitutional Limitations* (8th edition), pages 728-729.

There should be no doubt that it is guaranteed and protected by the Fourteenth Amendment. Certain it is that there is a widespread, and justified, belief that "neither liberty nor justice would exist if" it "were sac-

rificed." It constitutes "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[36]

This right "being in favor of the liberty of the people, must be given the most liberal and comprehensive construction."

State v. Butterworth, 142 Atl. 57 (N. J.)

Any possible abuse of the right to petition the government is of far less danger than is the necessity of maintaining that traditional and fundamental right against invasion from any source.

(1) *A Petition to the Government Is a Privileged Communication and the Privilege Is Forfeited Only if Express Malice Is Established.*

In the case of *Thorn v. Blanchard*, 5 Johns 507 (N. Y.), the court considered a libel action based on alleged libelous statements contained in a petition to remove the plaintiff from a public office. In reversing a judgment for the plaintiff, the court said (at 529):

> "The case before us cannot be considered as an ordinary libel, where malice is to be implied from the face of the libel. It was, at all events, incumbent on the prosecutor to prove express malice: to demonstrate that an evil intention existed: to show . . . that the petition was entirely false, malicious and groundless, and instituted not with a design to go through with it, but only to expose the defendant's character, under the show of a legal proceeding."

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[36]From Justice Cardozo in *Palko v. Connecticut, supra.*

Similarly, in *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591, it was held that such a petition is privileged and that in a libel suit the plaintiff must establish malice in order to prevail.

This rule should be followed here. The petition being directed to a Federal agency, the Federal law controls. Certainly a state court should not be permitted to override the Federal rule with regard to the privilege attached to a petition directed to a Federal agency.

The cases in which communications were held privileged because they were sent to public officials and directed to a redress of grievances are many. Some of them are:

Tyree v. Harrison, 100 Va. 540, 42 S. E. 295;

Harris v. Huntington, 2 Tyler 129 (Vt.);

Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023;

Gray v. Pentland, 2 Serg. & R. 23 (Pa.);

Decker v. Gaylord, 35 Hun. 584 (N. Y.), (42 Sup. Ct. Rep. N. Y.);

Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473;

Howard v. Thompson, 21 Wend. 319 (21 N. Y.);

Harwood v. Keech, 4 Hun. 389 (N. Y.);

Young v. Richardson, 4 Ill. App. 364;

Shields v. Commonwealth, 55 S. W. 881 (21 Ky. L. 1588);

Reid v. Delorme, 2 Brev. 76 (S. C.) (L. Rep. 1-2);

Keenan v. McMurray, 34 Pittsb. Leg. J. N. S. 223 (Pa.);

Hancock v. Mitchell, 98 S. E. 65 (83 W. Va. 156);

O'Donaghue v. M'Govern, 23 Wend. 26, 30, 32, (23 N. Y.).

These cases clearly establish that one who exercises the right here under consideration cannot be punished therefor, at least without a showing of malicious intent. The exercise of the constitutional right to petition ought not to be punished as a contempt, accordingly, without a showing that the alleged contemnor was motivated by an express desire to influence or embarrass the court in an improper manner.

The evidence which constitutes the basis of the petitioner's conviction is substantially as follows:

For some time prior to the dispatch of the telegram complained of, on ~~March~~ Jan. 24, 1938, there had been litigation in the Superior Court of Los Angeles County, entitled "Walker v. I. L. A.," No. 420356. One of the issues in that suit was the possession of the hiring hall maintained for the longshoremen of the San Pedro port, California. On ~~March~~ Jan. 21, 1939, after a trial upon the merits, the Superior Court, Judge Reuben Schmidt presiding, made and filed a permanent judgment and injunction by the terms of which a receiver was appointed to take possession of and to administer the hiring hall.

The telegram read as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied repre-

sentation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of *Schmidt* decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen of the Pacific Coast, does not intend to allow State courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

The petitioner, under oath, at the trial disavowed any intention to influence the court. The trial judge, in his judgment at the time of imposition of sentence, found that the telegram was not sent by the petitioner "with the specific intent of influencing Judge Schmidt in his decision" [R. 47].

Nor was there any evidence that the petitioner knew that, after the entry of judgment, the proceedings were still technically pending. On the contrary, he testified that he believed that with the entry of judgment the proceedings had terminated; and, further, that he had no knowledge of the pendency of motions for a new trial and to vacate the judgment [R. 116, 122-123]. This testimony was uncontradicted. The motions were filed March 24, 1939. On January 22nd an order was made by the trial judge staying proceedings in connection with the receivership order.

The uncontradicted evidence is that the petitioner dictated the telegram to his secretary; he did not, himself,

release the contents to the press, nor did he instruct any person so to do [R. 114].

No instructions were given by the petitioner to his secretary, except that it be sent [R. 114]. At the same time he dictated substantially the same telegram to the Chairmen of the National Maritime Commission and the National Labor Relations Board [R. 109-110].

The petitioner testified that he had been requested, as an officer of a labor union, by the Department of Labor and other Federal agencies concerned with industrial peace, to advise such agencies of situations that endangered industrial peace [R. 110-112].

He further testified that the sole purpose for sending the telegrams to these governmental departments was to comply with such request and to advise these governmental agencies of a situation which in his opinion, required the assistance of these Federal departments.

Pursuant to office routine, a copy of the telegram reached the desk of James D. O'Neil, the Public Relations Director of the C. I. O., who determined in his own judgment that the contents of the telegram were newsworthy, and who released the contents to the press [R. 102, 103]. This release was in accordance with the authority of Mr. O'Neil, as Public Relations Director, to determine what items were newsworthy [R. 100, 103-104, 115-116].

The release to the press was made by Mr. O'Neil without any instructions or communication from the petitioner [R. 104]; nor did the petitioner have any conversation

with Mr. O'Neil concerning the telegram or its release to the press [R. 103-104, 114].

The petitioner, as a representative of the longshoremen's union, manifestly believed that the union was aggrieved by the decision of the Los Angeles Superior Court; in communicating such grievance to the appropriate Federal governmental agency, to whom the Congress has delegated authority to seek to substitute industrial peace for threatened industrial disturbance, the petitioner was exercising in good faith the modern right of petitioning the government for a redress of grievances.

(2) The Publication in the Press Was Unavoidable and Was a Necessary Part of the Petition Itself.

The petitioner in sending the telegram complained of was acting on behalf of a union with thousands of members, scattered throughout the United States. All of them were entitled to know of the petitioner's communication to the Federal government in their behalf. Manifestly, any method selected by the petitioner to inform these members of his union of his communication with the United States Department of Labor would have resulted in the telegram becoming public. Unless the petitioner undertook to maintain secrecy and thus violate his duty to the membership of the union which he headed, publicity could not be avoided. The alternative to complete secrecy and concealment from the membership of the union was, under the circumstances, widespread publicity.

Even if such secrecy and concealment were possible, its desirability is doubtful. No one will contend that trade

union democracy is an end to be avoided. Yet, the procedure which would have been required to avoid the contempt prosecutions in this case, would have been the very opposite of union democracy.

Furthermore, as is admitted by all concerned, the question was one of great public concern. The *public* had a right to know what steps were being taken to prevent a possible tie-up of shipping. The petition in its very essence was a *public* and not a *private* matter. The fact that the Federal government was being called upon to act, and the response or failure to respond to such call, were of vital concern to the people of the Pacific Coast. Again, in a democracy, secrecy concerning such matters is both a method and end, to be studiedly eschewed.

(3) *The Right to Petition for a Redress of Grievances by Communicating With an Appropriate Federal Agency, Accordingly, Includes the Right to Make Said Communication Public.*

In its very essence, a petition to the government is a *public, not a private,* matter. Suppression or concealment of petitions to the government would be contrary to the fundamental democratic principle upon which this very right is based. Going a step further, this prerogative is a basic element of a democratic form of government; such a form of government requires the conduct of *public* affairs *publicly*. Therefore to deny the right to make public a petition is effectually to deny and nullify the right to petition itself.

That there are limits to the exercise of the right to petition, as to all rights, constitutional or otherwise, is not denied. In the absence of a showing of an express intent to influence or embarrass proceedings in a State court, however, punishment for the public exercise of the right to petition a federal agency abridges that right, in defiance of constitutional guarantees.

(4) *The Contempt Conviction Invades the Authority of the Federal Government.*

Only the government agency to which a petition is directed ought to be permitted to control its publication. To permit the State courts, by means of the asserted "inherent" contempt power to mete out punishment for the publication of an address to an agency of the Federal government, is to suffer and encourage serious impairment of both the authority and the function of such agency. The ever present threat of such contempt prosecutions would discourage appropriate communications with such federal departments.[37]

The federal Constitution should be construed to encourage such communications, not to tolerate "under the guise of regulation" the imposition of criminal penalties by state courts upon the exercise of this important and traditional federal right.

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[37] "The freedom of speech and of the press guaranteed by the Constitution embraces, at the least, the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama, supra.* (Italics ours.)

Point 3.

The Petitioner Was Denied Due Process in That His Right to Follow a Lawful Occupation, To-wit: That of a Labor Union Official, Was Unduly Impaired by the Contempt Judgment.

(a) Democratic Unionism Requires That Union Members Be Constantly Informed of the Activities of Their Leaders.

True democracy for the individual worker requires application of the principles of democracy to the internal life of the labor union to which he belongs. Dictatorship, secret negotiations;—all acts on the part of union officials without the knowledge of the membership, run counter to the basic principles of democracy in trade unions, just as such acts abridge political democracy. It is essential, therefore, that all union acts be made known to the membership of the union. As a practical matter, in the case of large unions such as the Longshoremen, this inevitably results in general publication. In fact, the trial judge in this case, recognized as one legitimate purpose for the sending and publication of the telegram "to let the employers and employees know that the matter was being energetically watched" [R. 47].

Here, then, we have the anomalous situation of the petitioner doing a *lawful* act (it is conceded that the mere sending of a telegram to the Department of Labor is lawful) in a *democratic* manner, and the State court inflicting punishment for failure to suppress and conceal this lawful act.

(b) In a Case Such as This, Where the Public Interest Is Involved, Proper Functioning of a Union Official Requires That the Public Be Informed of the Steps Taken by Him to Prevent a Tie-Up of Commerce.

The general public was vitally concerned with the subject matter of the telegram. Generally speaking, the public is directly affected by all labor disputes, and particularly by the controversy involved herein, the result of which might have been a serious and complete tie-up of all Pacific Coast ports. The trend today is toward greater dissemination of information concerning labor disputes and toward full public discussion of the problems involved.[38] It has been the universal experience that the bringing of all pertinent facts into the light of public day tends to expose the causes of labor unrest, and to avert strikes and the interruption of industrial peace. Nevertheless, it is charged in the instant case, that the failure to suppress and conceal lawful acts of great public concern constitute a contempt of court.

Accordingly, the sending of a telegram by a union official to the United States Department of Labor protesting a decision of a State court and pointing out that its enforcement will result in a serious interference with interstate commerce, is a reasonable and necessary part of a union official's occupation.

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[38]"Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." (Justice Murphy in *Thornhill v. Alabama, supra.*)

If collective bargaining, and legitimate labor unions as the instruments for the effectuation of collective bargaining, are to continue to have the effective sanction of the law, labor union officers must be permitted and encouraged to function, not in a vacuum, nor in secrecy, but in the open, and publicly. They should be protected in, and not penalized for, the exercise of their legitimate duties. If democracy in trade unionism is to be favored by the law, labor union officers should be encouraged to expose their every act, both to their constituents and to the general public through the instrumentality of the public press, which reaches both.

The litigation in the *Walker* case was of great public interest. The possibility of a Pacific Coast waterfront tie-up resulting from Judge Schmidt's decision was of grave public concern. The public was entitled to know every legitimate step taken by the petitioner in behalf of the union and its thousands of members to avert the danger of such a tie-up; the petitioner in dispatching the telegram complained of to the Secretary of Labor and in publicizing its contents in the public press, if it is determined that he is responsible for such publication, was merely fulfilling his duty both to his constituents and to the public.

(c) The Right to Pursue Any Calling or Profession May Not Be Unreasonably Restricted or Regulated.

That the right to engage in a lawful occupation is protected by the Fourteenth Amendment to the Constitution of the United States is well established.

This court has looked through the forms of restrictions upon employment to their essence, and pointed out their real effect.

Truax v. Raich, 239 U. S. 33, 41.

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment (14th) to secure."
>
> *Myer v. Nebraska*, 262 U. S. 390, 399.

It would seem that the right of the petitioner to carry on his occupation as a labor union official is hence protected by the Fourteenth Amendment.

To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby, is in effect to completely nullify the constitutional right to engage in that occupation at all.

Accordingly, a judgment which penalizes the petitioner for a legitimate act in the exercise of his lawful occupation offends federal due process.

Point 4.

There Is No Evidence to Support the Conviction of Contempt. A Contempt Judgment, Based Upon a Publication, in the Absence of Supporting Evidence, Denies Federal Due Process.

This Court will review the evidence when a Federal right has been specially set up, and claimed in a State court.

Norris v. Alabama, 294 U. S. 587;
Pierre v. Louisiana, 306 U. S. 354.

The evidence, which constitutes the basis for the conviction of the petitioner, has been set forth heretofore;[39] and will not be repeated here.

A contempt proceeding is essentially criminal and penal in nature.

Gompers v. U. S., 233 U. S. 604, 610;
Michaelson v. U. S., 266 U. S. 42.

The sentence imposed upon the petitioner by the trial court was penal. He was fined, and given a jail sentence in the alternative.

The evidence against the petitioner discloses a failure of proof of personal participation in the publication of the telegram complained of.

A judgment of conviction of contempt in the absence of such participation in the alleged offense denies federal due process.

Hoover v. Wise, 91 U. S. 308.

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[39] *Infra*, pp. 29-30.

Conclusion.

In other lands throughout the world, the beacons of liberty are dimmed; in many extinguished.

First of the democratic institutions to be crushed under the dictator's heel is a free press; second, the trade unions.

This court, in the last half decade, has scrupulously protected both these institutions. Freedom of thought, freedom of speech and freedom of the press have been safeguarded from state legislative and executive encroachment; the same protection should be accorded these "essential liberties" when the invader is the judicial department of a state.

Only thus—and through the exercise of "judicial self-restraint"— will the courts continue to serve as the guardians of the constitutional liberties of all of the people.

Respectfully submitted,

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INDEX.

Subject Index.

	Page
Petitioner's reply brief	1
I. The petition presents a Federal question: What constitutes contempt of court by publications is no longer merely a matter of local law	1
II The "Reasonable Tendency" doctrine, espoused by the respondent, and adopted and applied by the court below is not an ancient and well-defined common law principle; it is a new dogma	3
III. The distinction between the "clear and present danger" rule, and the reasonable tendency test is vital	5
IV. The reasonable tendency test adopted by the court below is not the application of a common-law standard; nor has the Legislature of California prescribed such a standard	10
V. There is no evidence in the record of any "clear and present danger" to the independence of the Los Angeles Superior Court	10
VI. The telegram was merely a legitimate announcement by the petitioner that the members of the petitioner's union would resort to legal action	12
VII. No evidence was adduced below, nor is there a finding to the effect that there was an actual interference with the administration of justice	13
VIII. This Court will review the evidence and determine whether a Federal constitutional right has in fact been abridged	13
Conclusion	14

Table of Cases Cited.

	Page
Abrams v. *United States*, 250 U. S. 616	6, 8
Cantwell v. *Connecticut*, 310 U. S. 308	7, 9
Debs v. *United States*, 249 U. S. 311	7
Gitlow v. *New York*, 268 U. S. 652	6
Herndon case, 301 U. S. 259	9
Mooney v. *Holohan*, 294 U. S. 103	3
Near v. *Minnesota*, 283 U. S. 697	2, 3
Patterson v. *Colorado*, 205 U. S. 454	1
Prudential Insurance Co. v. *Cheek*, 259 U. S. 530	2
Schaefer v. *United States*, 251 U. S. 466	6
Swift v. *United States*, 196 U. S. 375	8
Thornhill case, 210 U. S. 100	9
Toledo Newspaper case, 247 U. S. 402	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 19

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

I.

The Petition Presents a Federal Question: What Constitutes Contempt of Court by Publications is No Longer Merely a Matter of Local Law.

The respondent has argued, that "the instant petition presents no Federal question; what constitutes contempt is a matter of local law". (Respondent's Point I, Res. Br. 2-11, Res. Supp. Br. 45-49.)

This confessedly was true in 1907; for that is the effect of the majority view in *Patterson* v. *Colorado*, 205 U. S. 454. It is no longer the law today, where the alleged contempt

is the result of the expression of opinion. For the exercise of freedom of expression, it is now definitively determined by this Court, is an exercise of a Federal constitutional right.

From *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 538 (1922):

"* * * Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech'," to *Near* v. *Minnesota*, 283 U. S. 697 (1931): "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by State action", is less than a decade in the history of this Court. The law of less than a decade ago on this subject, is not the law today.

Justice Holmes lived to repudiate each of the three major propositions espoused by him in the *Patterson* case; and later to concur with the viewpoint expressed in Justice Harlan's dissent.

He pioneered in rejecting the "dangerous tendency" doctrine, substituting for it the "clear and present danger" standard; he was first, in later years, to urge that freedom of thought should be protected by the Federal Constitution from State invasion and that freedom of speech means not alone immunity from previous restraint.

Even more significant was his repudiation of the "tendency" doctrine in his (and Justice Brandeis') dissent in the *Toledo Newspaper* case, 247 U. S. 402.[1]

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[1] Prof. Zechariah Chaffee, Jr., the outstanding scholar on freedom of speech, so believes. "Fortunately he (Justice Holmes) has now repudiated this (the Blackstonian) interpretation of freedom of speech." *Chaffee, Freedom of Speech*, p. 8. Prof. Chaffee then cites the *Schenck* and *Abrams* cases, in each of which Justice Holmes enunciated the "clear and present danger" rule.

Certain it is, moreover, that it is no longer the law, that "the demands of due process are met by adequate notice of hearing, and opportunity to be heard" (Res. Br. 6) *Mooney* v. *Holohan*, 294 U. S. 103, expressly rejected a similar contention by the State of California.

II.

(a) The "Reasonable Tendency" Doctrine, Espoused by the Respondent, and Adopted and Applied by the Court Below, is Not an Ancient and Well-defined Common-law Principle; it is a New Dogma. (Respondent's Point I, Res. Supp. Br. 8-23).

The respondent urges that this test is of "indubitable antiquity" (Res. Supp. Br. 8); that it is "the common-law of centuries" (Res. Supp. Br. 19); that it is the "ancient common law standard (Res. Br. 26), successfully administered for "some two hundred years or more" (Res. Supp. Br. 30). We demur to these claims. History does not support them.[1a]

Not until the *Toledo* case (1921) does that test finds its way in the decisions.[2] *Not one* of the early cases, cited by respondent invokes or applies the rule. Nor has the Supreme Court of California ever done so prior to the instant case.

(Indeed, in *Near* v. *Minnesota*, 283 U. S., at p. 715 (as quoted in Res. Supp. Br. 8), the phrase used is "There is

[1a] Moreover, the early cases in the United States adhered strictly to the Blackstonian views upon free speech now happily discarded by this Court. Chaffee refers to *Respublica* v. *Oswald* Dall. 319 (Pa.) (cited by the respondent) (Res. Br. 8, 12), as an example of the application of the now rejected view. He adds: "The Federalist Judges of that time were so notorious for their slavish adherence to English authorities in disregard of our own constitutions and statutes, that their Blackstonian statements should have little weight in the construction of constitutional guaranties". *Chaffee, Freedom of Speech*, 8, 9.

[2] Over the dissents of Justices Brandeis and Holmes.

also the conceded authority of the courts to punish for contempt when publications *directly tend* to present the proper discharge of judicial functions." (Italics ours.) This concept constitutes a forerunner of the "clear and present danger" rule first expressly applied in the *Herndon* case.)

Accordingly, the doctrine invoked by the court below is of comparatively *recent* origin.[3]

It is to be noted, moreover, that the "reasonable tendency" standard was not applied in the instant case, until it reached the Supreme Court of California. Prior thereto it was the "inherent tendency" formula. The charge against the petitioner was to the effect that the statements contained in the telegram, and the publication of its contents "were in and of themselves calculated and had an *inherent* tendency to interfere with influence, sway and control" (Judge Schmidt) and to "interfere with the orderly and due administration of justice * * *" (R. 4).

Upon *that* theory alone was the petitioner convicted, the trial court finding that the sending of the telegram and the publication of its contents "were in and of themselves calculated, and had an *inherent* tendency to interfere with the orderly administration of justice", etc. (Italics ours.)

It was not until the proceeding reached the Supreme Court of California, did this *novel* doctrine in the California law first find espousal by the California courts.

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[3] In the course of the oral argument in the case at bar, in reply to an inquiry from Justice Frankfurter, as to whether the doctrine was of ancient source, and was in effect at the time of the adoption of the Constitution, petitioner's counsel answered in the affirmative. This was due to a misunderstanding of the question on counsel's part. We confused the question and thought we were replying to an inquiry as to whether the courts had asserted an alleged "inherent power" to punish for constructive contempt, irrespective of statutory or constitutional authority. The assertion of such "inherent" authority is conceded to be ancient.

Cf. Fox, History of Contempt;
Frankfurter and Landis, 37 Harvard Law Review 1010;
Nelles and King, 28 Columbia Law Rev. 401, 525.

(b) Ancient Error May No Longer Parade as Truth Before this Court.

Even if our challenge of the historicity of the test proposed by the Respondent is to be rejected, mere antiquity is no longer sufficient ground in this Court for perpetuation of error. At the last term this Court upset a century-old practice.[4] Principles of constitutional law are to be determined not *in vacuo*, but in accordance with the imperative social needs of a changing and growing democracy; they are "fluid and dynamic."[5]

Stare decisis is not "a universal, an inexorable command."[6]

"Modification implies growth. It is the life of the law."[7]

"To rest upon an ancient formula, is a slumber, which, if prolonged, means death."

III.

The Distinction Between the "Clear and Present Danger" Rule, and the Reasonable Tendency Test is Vital.

The respondent's claim that there is no distinction between the two is without substance (Res. Br. 19; Res. Supp. Br. 18).[7a]

The essential difference is: the former rule is substantially *objective*; the latter entirely *subjective*. (The uncertainty of the subjective doctrine is discussed in Petitioner's Brief, 5-15.)

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[4] *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

[5] Cardozo, "Nature of Judicial Process", 81.

[6] Justice Brandeis, dissenting in *Washington* v. *Dawson Co.*, 264 U. S. 219, 238.

[7] Justice Brandeis, quoted by Cardozo, "Law and Literature", p. 15.

[7a] The court below acknowledged the distinction. In its opinion it expressly rejected the "clear and present danger" rule (R. 158).

We have suggested at least two objective elements. Pet. Br. 19-20.

A practical example [8] is afforded by the instant case. It may be claimed that the application of the reasonable tendency test will support the conviction of the petitioner; no contention is, or can be made, that the application of the "clear and present danger" criterion, assuming the adoption of the objective standards suggested by the petitioner, will permit the judgment to stand, for

(A) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(B) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California, but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

Further practical examples may be found in the decisions of this Court in *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v. *U. S.*, 251 U. S. 466, and *Gitlow* v. *New York*, 268 U. S. 652; the difference between the application of the two tests there, meant the difference between guilt and innocence; the majority of the Court upheld the convictions in each instance by applying the tendency rule; Justices Holmes and Brandeis dissented because they held that the convictions could not stand up under the "clear and present" standard.

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[8] To comply with Justice Frankfurter's request made in the course of the oral argument.

The rejection of the tendency doctrine in the *Herndon* case has been adequately discussed, heretofore. It is to be noted, moreover, that in the reaffirmance and extension of the "clear and present" rule in the last term of this Court, in each of the cases considered, the Court rejected again the "tendency" doctrine urged upon it.[9]

In addition, in the application of the "clear and present danger" rule, *intent* has been recognized as an important element.[10] As originally expounded by Justice Brandeis, intent is mentioned:

> "That the necessity which is essential to valid restriction does not exist unless speech would produce, *or is intended to produce*, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Italics ours.) [11]

In the free speech decisions of this Court, the more recent the case, the greater is the emphasis upon the existence or absence of intent to accomplish the substantive evil which is within the allowable area of State or Federal control, as the basis for upholding, and annulling, respectively, of convictions.

Thus in *Debs* v. *U. S.*, 249 U. S. 311, 312, Justice Holmes, speaking for the Court, upheld the judgment only because there was a "manifest intent" to encourage resistance to the draft. The Court (p. 215) required a concurrence of intent *and* probable effect, stating (p. 216):

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty

[9] See *Carlson* v. *California*, 310 U. S. 106, Appellee's Brief, summarized at p. 107.

Cantwell v. *Conn.*, 310 U. S. 297, Appellee's Brief, summarized at p. 299.

[10] Justice Stone, in the course of the oral argument, seemed to question the pertinency of intent to influence a court, as an element of the offense of contempt by publication.

We do not suggest his "questioning" was hostile. It was in the "Socratic manner."

[11] *Whitney* v. *California*, 274 U. S. 357, 372.

for advocacy of any of his opinions unless the words used had as their natural tendency *and* reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the *specific intent* to do so in his mind." (Italics ours.)

Soon thereafter Justice Holmes, in his dissent in *Abrams* v. *U. S.*, 250 U. S. 616, 626, discussed the importance of intent in prosecutions for utterances:

> "I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law may be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence would follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind."
>
> "An actual intent * * * is necessary to constitute an attempt, when a further act of the same individual is required to complete the substantive crime for reasons given in *Swift* v. *U. S.*, 196 U. S. 375, 396.
>
> "It is necessary when the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils to be checked" (at p. 628).[12]

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[12] In *Swift* v. *U. S.*, *supra*, at p. 396, Justice Holmes said:

"Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further action in addition to the mere forces of nature to bring the result to pass, an *intent* to bring it to pass is necessary in order to produce a *dangerous probability* that it will happen." (Italics ours.)

These views applied to the case at bar are peculiarly apt.

For the petitioner to accomplish the evil complained of, namely, influencing Judge Schmidt in Los Angeles, he had to rely upon others:

First: upon his Secretary to deliver a copy of the telegram to the Publicity Director of the C. I. O.

Secondly: upon the Publicity Director to:

(a) release the contents of the telegram to the press and

(b) release it in such a manner that the Associated Press would transmit a copy of the telegram to the Los Angeles newspapers, and be published by them; and

Thirdly: upon some newsboy in Los Angeles to deliver a copy of a newspaper containing a copy of the telegram.[12a]

The petitioner gave no express orders for the doing of any of the above.

In the more recent decisions of this Court intent is always considered, often emphasized. This is true in the *Herndon* case (301 U. S. at pp. 259, 260, 262), in the *Thornhill* decision, 310 U. S. at p. 100, footnote 17; and in *Cantwell* v. *Connecticut*, 310 U. S. at p. 308.

It is to be noted, moreover, that in the instant case, an express intent to influence Judge Schmidt was charged (R. 3).[13] But the proof did not support the charge, and the trial court found the exact convers [14] (R. 47). This is conceded by the respondent (Res. Supp. Br. 66).

[12a] Chief Justice Gilson, below, recognized "intent" as an important element of the offense. (Quoted in Pet. Br. 17; R. in No. 64, 140.)

[13] It is charged that the contents of the telegram "were put in the course of publication by said H. R. Bridges for the purpose of bringing the same to the *personal* attention of and influencing the said Ruben S. Schmidt," etc. (R. 3).

[14] "* * * but because it seems to me to be a reasonable inference to be drawn from all the circumstances of his sending of the telegram, that *there was no specific intent on his part to use this telegram as a subterfuge to get his message over to the judge.* I do not think it was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47). (Italics ours.)

IV.

The Reasonable Tendency Test Adopted by the Court Below is Not the Application of a Common-Law Standard; Nor Has the Legislature of California Prescribed Such a Standard (Res. Supp. Br. 32-35).

The respondent, in the oral argument, in an effort to distinguish away the *Herndon* case, asserted for the first time —never heretofore claimed in the courts below, nor in this Court—that Sec. 1209, subsection 9, of the California Code of Civil Procedure will support the judgment. That section reads:

> "Sec. 1209. The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court.
>
> 9. Any other unlawful interference with the process or proceedings of a court."

It is argued that subsection 9 constitutes an acceptance by the California Legislature of the ancient practices and standards of the judges *in re* contempt as sanctioned by the common-law.

But subsection 13 is forgotten. On the precise question of contempt by publication, the California Legislature abandoned any common-law test in the nineteenth century (1891) by enacting that:

> "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings" (R. 147).

The legislative will was nullified by the court below; it held [15] the legislative determination to be a violation of the

---

[15] Over the vigorous dissents of Justice Edmonds (R. 161), and Chief Justice Gibson (reported in No. 64, R. 140).

"inherent" authority of the courts to punish for constructive contempt by publication.

In any event, if subsection 9 of Section 1209, C. C. P., is now relied on by the respondent, the petitioner challenges that subsection, as offending Federal due process because of its vagueness and uncertainty [16]

V.

There is No Evidence in the Record of Any "Clear and Present Danger" to the Independence of the Los Angeles Superior Court.

The allegations by the respondent to the contrary effect are highly improper, substantially false and wholly *de hors* the record [17] (Res. Supp. Br. 56-60).

The serious charges lodged by the respondent against both the C. I. O. and A. F. of L. are utterly *false*. Such irresponsible allegations call for *proof*. No such evidence was adduced in the instant case; no such proof was even proffered. They are nowhere even mentioned in the record.

Respondent's statement that the matters were before the

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[16] Compare, Justice Murphy in *Thornhill* case, at p. 100:

"The words themselves have no ascertainable meaning either inherent or historical."

Accord; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

"No one may be required at price of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

In the oral argument respondent's counsel dubbed this subsection as an "omnibus clause", in the nature of a "catch-all" provision. Penal statutes may not, without offending Federal due process, serve as "catch-alls"; and this is the more true in the domain of free speech.

[17] Allegations *de hors* the record, contained in a brief, have been disregarded and condemned by this Court.

Schley v. *Pullman Car Co.*, 120 U. S. 575, 578; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 796; *Hussman* v. *Durham*, 165 U. S. 144, 150.

This Court cannot take judicial notice of controverted allegations concerning local conditions in a community three thousand miles away. Particularly is this true when the local courts have not done so.

judge "of which he could and presumably did take notice" (Res. Supp. Br. 56) are equally untrue.

The trial judge took no such notice; nor was he even requested, according to our best recollection, to take notice of what is essentially the product of the respondent's perfervid imagination, instead of a dispassionate statement of alleged facts.

So far as the Supreme Court of California is concerned, that court, in effect, *refused* to take the judicial notice requested by the respondent in its *brief* (not in the record), by expressly *rejecting* the application of the "clear and present danger" rule (R. 158). No mention is made by that court of any of the matters contended for by the respondent.[18]

VI.

The Telegram Was Merely a Legitimate Announcement by the Petitioner that the Members of the Petitioner's Union Would Resort to Legal Action.

It was not a "threat" as suggested by the respondent (Res. Supp. Br. 82) and by the court below (R. 156).

Even if the telegram be construed as a warning of an impending strike, the right on the part of workers to resort to such economic action is now well established.

It is to be borne in mind that "A 'threat' may be a warning of violence; it may be merely a warning that one will do a legally permissible act." [19]

[18] Counsel for respondent themselves suggest a doubt as to the propriety of these allegations (Res. Supp. Br. 49). The statement that Judge Schmidt ultimately reversed himself, is even the more reprehensible and indefensible (Res. Supp. Br. 65, 82). It nowhere appears in the record. The prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Justice Sutherland, in *Berges* v. *U. S.*, 295 U. S. 78, 88.

Cf. Justice Brandeis, dissenting, in *Olmstead* v. *U. S.*, 277 U. S. 438, 485.

[19] Frankfurter, "The Labor Injunction", p. 34.

Cf. Holmes, in *Vegelahn* v. *Guntner*, 167 Mass. 97, 107 (1896):

"As a general rule, even if subject to some exceptions, what you may do in a certain event, you may threaten to do, that is, give warning of your intention to do * * *."

VII.

No Evidence Was Adduced Below, Nor Is There a Finding to the Effect That There Was an Actual Interference With the Administration of Justice.

The respondent's intimations and statements to the contrary are in error (Res. Br. 27; Res. Supp. Br. 39, 64, 81).

The trial court's observation that the telegram and its publication "did embarrass and disturb the administration" (Res. Supp. Br. 8) (R. 46) was an informal comment that was not incorporated in the judgment; it has *no* support in the evidence.

The phrase that the petitioner "unlawfully interfered with the proceedings of this Court (Res. Supp. Br. 39, R. 52) is found only in that portion of the judgment which contains the conclusions of law, and *not* the findings; and does not purport to be a finding of fact.

VIII.

This Court Will Review the Evidence and Determine Whether a Federal Constitutional Right Has In Fact Been Abridged.

We dissent from the respondent's position (Res. Supp. Br. 50-54) that only in the event this Court rules that the courts below applied an erroneous standard of guilt will it examine the evidence.

Under Point 4, in petitioner's brief (Pet. Br. 38) we urged:

> "There Is No Evidence to Support the Conviction of Contempt. A Contempt Judgment, Based Upon a Publication, in the Absence of Supporting Evidence, Denies Federal Due Process."

No matter what doctrine the State court applied, this Court will review the evidence, since the petitioner has

properly asserted a claim that the *judgment* below (not alone the standard applied below) deprives him of freedom of speech.[20]

The application of *either* the "clear and present danger" or "tendency" rule, to the meager evidence in the record, abridges the petitioner's Federal constitutional right to freedom of expression.

Conclusion.

There are many who believe that criticism of the decisions of the judges, if the democratic process is to be maintained and encouraged, is not only not to be avoided, but to be encouraged; that the "Ivory Tower" is not a fit permanent abode for the judicial spirit. Judicial scholars have urged that "other social interests may be paramount to the insulation of justice".[21] Great jurists have recognized that the issues facing determination by the judiciary are the problems of statesmanship.[22] "The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by."[23]

The cure for the "evil" of public discussion of public issues pending in the courts lies with the judges—not through the exercise of the contempt power by enjoining

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[20] *Pierre* v. *Louisiana*, 306 U. S. 354, at 358:

"When a claim is properly asserted * * * it becomes our solemn duty to make independent inquiry and determination of the disputed facts."

Norris v. *Ala.*, 294 U. S. 587, 590:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, the examination will be made."

[21] *Nelles and King* "Contempt by Publication", 28 Columbia Law Review, at p. 549.

[22] Cf. Holmes, The Path of the Law.
Cardozo, Nature of Judicial Process.

[23] Cardozo, *ibid*, p. 107.

the functioning of a free press, and thus achieving a "silence coerced by law";[24] but through the exercise of "reasonable fortitude". Only this exercise will protect the judiciary from the protests of the labor leader, the comment of the newspaper, and the clamor of the mob, and only thus can the "Independence of the Judiciary" be reconciled with the "Freedom of the Press."

Respectfully submitted,

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[24] From Justice Brandeis, concurring in the *Whitney* case, *supra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1.

HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF ON REARGUMENT.

OSMOND K. FRAENKEL,
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A. L. Wirin,
Ben Margolis,
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INDEX.

PAGES

POINT I: The power of state judges to punish for contempt is restricted by the Due Process Clause of the Fourteenth Amendment to the same extent as is the power of the executive and the legislature .. 4

POINT II: Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the court-room, there can be no punishment except where the expression either actually obstructed judicial action, or was intended improperly to influence judicial action or, in the absence of such intent, there was a clear and present danger that judicial actior would improperly be influenced 8

POINT III: There was no justification for the punishment in the case at bar 25

APPENDIX 30

CASES.

A. F. of L. v. Swing, 312 U. S. 321 ..... 6, 11

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 5
Brown v. Mississippi, 297 U. S. 278 5

Cantwell v. Connecticut, 310 U. S. 296 ..... 6, 7n, 11, 12, 13
Carlson v. California, 310 U. S. 106 ..... 7n
Comm. v. Conroy, 69 Pittsb. Legal J. 373 ..... 19n
Craig v. Hecht, 263 U. S. 255 21

deJonge v. Oregon, 299 U. S. 353 ..... 6, 7n, 27

Ex Parte Craig, 282 Fed. 138 ..... 9n
Ex Parte Hickey, 12 Miss. 750 ..... 6n
Ex Parte Shuler, 210 Cal. 377 13

PAGES

Fiske v. Kansas, 274 U. S. 380 6

Gitlow v. New York, 268 U. S. 652 6
Grosjean v. American Press Co., 297 U. S. 233 ..... 7n

Hague v. C. I. O., 307 U. S. 496 ..... 7n, 10, 28
Hansberry v. Lee, 311 U. S. 32 5
Herndon v. Lowry, 301 U. S. 242 ..... 6, 10, 23

In re Shortridge, 99 Cal. 526 13
In re Stolen, 193 Wisc. 602 28

Lovell v. Griffin, 303 U. S. 444 ..... 7n, 10

McKee v. Hughes, 133 Tenn. 455 28
Mooney v. Holohan, 294 U. S. 103 5
Moore v. Dempsey, 261 U. S. 86 5

Near v. Minnesota, 283 U. S. 697 ..... 7n
New York ex rel. Tipaldo v. Morehead, 298 U. S. 587 ..... 18n
Nixon v. State, 207 Ind. 426 19
Nye v. United States, 313 U. S. 33 ..... 7, 14

Patterson v. Colorado, 205 U. S. 454 ..... 6, 20, 21
People ex rel. Barnes v. Court of Sessions, 147 N. Y. 290 ..... 19n
People ex rel. Pierson v. Lynch, 263 N. Y. 533, 266 N. Y. 431 ..... 17n
People ex rel. Supreme Court v. Albertson, 242 App. Div. (N. Y.) 450 ..... 6n, 19n
Powell v. Alabama, 287 U. S. 45 5

Schneider v. Irvington, 308 U. S. 147 ..... 7n, 10
Sinclair v. United States, 279 U. S. 749 20
State v. American News Co., 64 So. Dak. 385 ..... 6n, 19
State ex rel. Attorney General v. Circuit Court, 97 Wisc. 1 ..... 6n
State ex rel. Metcalf v. District Court, 52 Mont. 46 ..... 6n
State ex rel. Pulitzer Publ. Co. v. Coleman, 152 S. W. 2nd 640 (Mo.) 15

PAGES

Thornhill v. Alabama, 310 U. S. 88 ..... 7n, 10
Times Mirror Co. v. Superior Court, 15 Cal. 2nd 99 ..... 3, 17, 22, 24
Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 14, 20
Tumey v. Ohio, 273 U. S. 510 5

United States v. Morgan, 313 U. S. 18
United States v. Cruikshank, 92 U. S. 542 28

Yancey v. Comm., 135 Ky. 207 28

STATUTES.

Cal. Code Civ. Proc., §1209 ..... 3, 12, 13

N. Y. Civil Practice Act, Art. 78 ..... 17n
N. Y. Judiciary Law, §750 (b) 19n
N. Y. Penal Law, §600 (7) 19n

Pa. Ann. Stat., Title 17, §2045 ..... 19n

Va. Statute on Religious Liberty 23

AUTHORITIES.

Cohen, The Powers of the New York Court of Appeals 17n

Fox, The History of Contempt of Court 14
Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts, 37 Harv. L. R. 1010 14

Nelles and King, Contempt by Publication in the United States, 28 Co. L. R. 401, 525 ..... 14, 16n, 19, 22

Thomas, Problems of Contempt of Court 22

48 Yale L. J. 54 ..... 14n

IN THE

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OCTOBER TERM, 1941.

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HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF ON REARGUMENT.

We believe that a further statement of the facts and issues may be helpful to this Court upon the reargument of this case.

Petitioner has been convicted of contempt of Court because of the publication of a telegram which he sent to the Secretary of Labor of the United States. Petitioner was the President of the International Longshoremen's & Warehousemen's Union. The telegram in question was sent three days after a decision by Judge Schmidt of the Superior Court of the State of California in an action in which a local of that Union and its officers (but not petitioner) were defendants (R. 7, 8). The decision granted an in-

junction and appointed a receiver. It was the culmination of a controversy between an A. F. of L. union and a C. I. O. union for control of the hiring halls and other facilities of organized labor in the shipping industry on the West Coast.

The telegram is as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board" (R. 2, 3).

Shortly thereafter a proceeding for punishment for contempt was instituted by the Executive Secretary of the Los Angeles Bar Association. Petitioner denied any intent to obstruct justice (R. 42) and, by demurrer, claimed the protection of the 14th Amendment (R. 40). The matter came on before a judge other than the one involved in the litigation which prompted the sending of the telegram. This judge, although stating:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt nor his decision" (R. 47),

punished petitioner for contempt on the ground that the statements contained in the telegram and the publication of the telegram were "calculated to and had an inherent tendency" to interfere with the administration of justice and to control the proceedings in the action already referred to (R. 52). This conclusion was predicated upon the contention that the case before Judge Schmidt was pending undetermined because the time to apply for a rehearing had not expired (R. 47). Petitioner was sentenced to pay a fine of $125 (R. 52).

The Supreme Court of California affirmed the conviction. Its opinion is reported in 14 Calif. 2nd 464. Judge Edmonds of that Court dissented. In upholding the conviction the California Supreme Court, in this and the similar *Los Angeles Times* case (now before this Court) disregarded the plain terms of a fifty-year old California statute, holding it to be unconstitutional. The statute provides:

> "But no speech or publication reflecting upon or concerning any court or officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings (sec. 1209, Code Civ. Proc.)."

On this state of facts petitioner believes that there are three questions for the consideration of this Court:

1. Is the power of State judges to punish for contempt subject to the restriction of the due process clause of the Fourteenth Amendment?

2. If such restriction exists what is its nature and extent?

3. Was the conviction in the case at bar proper?

Petitioner contends for the following answers to each of these questions.

1. The power of State judges to punish for contempt is restricted by the due process clause of the Fourteenth Amendment to the same extent as is the power of the executive and the legislature.

2. Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the courtroom, there can be no punishment except where the expression either actually obstructed judicial action, or was intended improperly to influence judicial action or, in the absence of such intent, there was a clear and present danger that judicial action would improperly be influenced.

3. There was no justification for the punishment in the case at bar.

POINT I.

The power of State judges to punish for contempt is restricted by the due process clause of the Fourteenth Amendment to the same extent as is the power of the executive and legislative branches.

The applicable provision of the Fourteenth Amendment to the United States Constitution reads:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

That this provision is applicable to action by the judicial branch of the government, as well as to action by the legis-

lative and executive branches, is well established by decisions of this Court. As was said by Mr. Justice Brandeis in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, at 680:

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

This rule has been applied both to procedural violations of the due process concept and to situations in which the state action was found to violate the basic constitutional guarantees of freedom of speech, of the press, of assembly and of religion, and in both civil and criminal cases.

Thus, on the procedural side, this Court has reversed convictions where the accused was denied an opportunity to obtain counsel (*Powell* v. *Alabama*, 287 U. S. 45); where the State courts permitted conviction although the only evidence was obtained by torture (*Brown* v. *Mississippi*, 297 U. S. 278); where the judge who imposed a fine was paid by being allowed to keep part of the fines he imposed (*Tumey* v. *Ohio*, 273 U. S. 510). And this Court has also held that judicial action is void when it permits a trial to become an instrument of the mob's desire to lynch (*Moore* v. *Dempsey*, 261 U. S. 86); or where a State judge permitted conviction by the deliberate use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103).

And in civil cases State judicial action has been similarly challenged. Thus, in *Hansberry* v. *Lee*, 311 U. S. 32, this Court held that there had been a failure of due process where a State Court allowed a party to plead as res adjudicata a judgment obtained in a suit in which the other party had not been represented.

So this Court has ruled also when it concluded that the basic constitutional guarantees of freedom of expression had been invaded. Convictions have been reversed because the State courts permitted the case to go to the jury in

the absence of evidence sufficient to justify conviction under the applicable statute (*Fiske* v. *Kansas*, 274 U. S. 380; *deJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242).* In *Cantwell* v. *Connecticut*, 310 U. S. 296 and *A. F. of L.* v. *Swing*, 312 U. S. 321, this Court set aside state judicial action on the ground that freedom of speech had been interfered with.

It is true that the application of this principle has not yet been extended by this Court to cases involving contempt of Court.** The only case arising from State action in which the problem was presented to this Court is *Patterson* v. *Colorado*, 205 U. S. 454. But that case can no longer be considered authoritative on the subject since it doubted whether the Federal Constitution protected against State interference with freedom of the press and supposed that freedom of expression was protected primarily against attempts at prior restraints and not against subsequent punishment, positions which have ceased to be accepted by this Court (compare cases from *Gitlow* v. *New York*, 268 U. S. 652, through *Cantwell* v. *Connecticut*, supra). It is the dissenting opinion of Mr. Justice Harlan in the *Patterson* case which foreshadows the present view of this Court.

In view of the wide protection given by this Court to freedom of expression and opinion in a long line of recent

*That a State statute was involved in these cases does not detract from the ultimate fact that this Court reversed because the State judges had permitted conviction on evidence which did not meet the constitutional requirements of a criminal act.

**There are, however, some state decisions which have held punishment of publications as contempts to be prohibited by the free speech provisions of their Constitutions:

Ex parte Hickey, 12 Miss. 750 at 782;
State ex rel. Metcalf v. *District Court*, 52 Mont. 46;
People ex rel. Supreme Court v. *Albertson*, 242 App. Div. (N. Y.) 450;
State ex rel. Attorney General v. *Circuit Court*, 97 Wisc. 1;
See also *State* v. *American News Co.*, 54 So. Dak. 385.

cases when this expression was interfered with by legislation, or by judicial misinterpretation of such legislation,* it cannot be supposed that this Court will hold that the power of State judges to punish for contempt is free from any constitutional restraint under the due process clause.

Indeed there are special reasons why judicial action in punishing for contempt should be subject to scrutiny on constitutional grounds. Where legislative action or executive action is in question, the power of review falls to a different branch of government. Not so in contempt cases. Here the judiciary sits in review upon the acts of its own members. Moreover, in many cases, although not here, the action under review was taken by the very judge criticized in the publication complained of. And in all cases the procedure is summary, without that safeguard of trial by jury which has been found in Anglo-Saxon countries so necessary to protect the common man against judicial tyranny. As we have shown, judges are not immune from constitutional restrictions when exercising their functions as interpreters of the law or when presiding over trials, both criminal and civil. To exempt them from such restrictions when they are exercising the very special power of punishing for contempt would be an anomaly indeed. And that this Court does not suppose that any such exemption exists may be inferred from the careful language of Mr. Justice Douglas in *Nye* v. *United States*, 313 U. S. 33, where he said:

> "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power" (p. 50).

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*Near v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *deJonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *The Leaflet Cases*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S 106; *Cantwell* v. *Connecticut*, 310 U. S. 296.

We confidently assert, therefore, that the constitutionally permissible scope of the contempt powers is not unlimited. We shall now concern ourselves with various suggested limitations on that power.

POINT II.

Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the courtroom, there can be no punishment except where the expression either actually obstructed judicial action, or was intended improperly to influence judicial action or, in the absence of such intent there was a clear and present danger that judicial action would improperly be influenced.

The restrictions of the due process clause have, under modern interpretation, assumed a double aspect. With the strictly procedural phase we need not here concern ourselves. But it is now well settled that the due process clause has a substantive meaning as well. Because the contempt here charged consisted of a publication outside of the courtroom, we shall restrict ourselves to a discussion of the extent to which the modern conception of due process in its substantive sense imposes a limitation upon the power of the courts to punish such publications.

There are, we suggest, four possible varities in the nature of the publications which might be subject to punishment as interfering with the administration of justice:

1. Those which actually obstruct judicial proceedings;

2. Those which while failing to achieve their purpose were intended to obstruct;

3. Those which neither obstruct, nor were intended to do so, but which were put out under circumstances such

ta. there was a clear and present danger that obstruction would result.*

4. Those which merely had a "reasonable tendency" to cause obstruction.

There never has been dispute but that publications falling within the first category might be punished as contempt of court. But controversy has raged with regard to the other three categories; in large part whether punishment should take the form of the summary method of contempt or the more protective method of indictment. With that controversy, we shall not concern ourselves, believing that it raises no issue under the federal constitution. But we contend that to permit any punishment for expression of opinion merely because it has a "tendency" to interfere with the administration of justice does violate the constitutional guaranties of the 14th Amendment—that such punishment is as forbidden in this field as in the field of espionage, sedition or breach of the peace.

Before elaborating this subject, it will be helpful to review the recent cases in this Court which have dealt with restrictions on freedom of expression, however attempted. This Court has recognized that the right freely to express one's views is an essential attribute of democratic society. It has recognized also that this right is not absolute and that the state may restrict the right, as by punishment for criminal libel, by punishment for advocacy of violent overthrow of government—and also by punishment for contempt of Court. On the one hand, is the guaranty of free expression embodied directly in the Constitution with regard to the Federal Government, and indirectly, through the due process clause, with regard to the states. On the other hand, is the requirement that orderly government

*The applicability of the "clear and present danger" test to cases of contempt of court was suggested by Judge Learned Hand, dissenting, in *Ex parte Craig*, 282 F. 138, 160.

persist. Both of these are essential to the functioning of a democratic society. When, as here, it is claimed that one of these requirements conflicts with the other, it becomes the high duty of this Court to reconcile the conflicting claims.

When the conflict between State action, though declared by legislation, and free expression of opinion was clear, this Court has not hesitated to cast the balance in favor of freedom of expression (*Herndon* v. *Lowry*, supra; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496). And in *Schneider* v. *Irvington*, 308 U. S. 147, Mr. Justice Roberts said at page 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as adminishes the exercise of rights so vital to the maintenance of democratic institutions."

There the Court held that ordinances banning the distribution of leaflets upon the public streets were void despite the contention of municipalities that such ordinances were necessary to prevent littering of the streets. So, in *Thornhill* v. *Alabama*, 310 U. S. 88, this Court held void a State statute which banned peaceful picketing though enacted to protect employers in the conduct of their lawful businesses. There Mr. Justice Murphy said:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of

> public concern without previous restraint or fear of subsequent punishment."

And, as already noted, this view was extended in *A. F. of L.* v. *Swing*, supra, to judicial action without the support of State statutory law where an injunction had been issued against all picketing. Mr. Justice Frankfurter said there that the right to free discussion "is to be guarded with a jealous eye." Recognizing that the State had power to regulate problems created by industry and to preserve the peace, he said:

> "Not even these essential powers are unfettered by the requirements of the Bill of Rights."

This Court rejected the justification sought to be made by the State courts in that case, based on the circumstance that the dispute was one between the workers and an employer by whom they had never been employed.

Finally, in *Cantwell* v. *Connecticut*, supra, this Court, in addition to holding void a statute which vested in administrative authority the right to determine whether a cause for which money was being solicited was a religious or charitable one and which prohibited solicitation except under license by such authority, also reversed a conviction for disorderly conduct. In so doing Mr. Justice Roberts expressly stated that he was weighing "two conflicting interests": "the free exercise of religion protected by fundamental law and the interest of the State in the preservation of peace and good order."

For the purposes of our present discussion the *Cantwell* case is, therefore, of the closest interest. This Court pointed out that the conviction was not based on a statute evincing a legislative judgment that the particular kind of discussion there being carried on had a tendency to provoke disorder, although doubt was expressed as to the validity even of a statute so carefully drawn. It was noted that

the judgment there under review was "based on a common law concept of the most general and undefined nature." It was recognized that various forms of speech might be punished without constitutional restraint for causing a breach of the peace, as words which incite to riot or exhort to physical attack. In pointing to those things which the State could punish without constitutional restraint, the Court stressed the "*clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other *immediate* threat to public safety, peace or order" (emphasis ours). The Court also pointed out that resort to epithets or personal abuse might be punished since these did not constitute communication of information or opinion. Finally, Mr. Justice Roberts said:

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

The language of the *Cantwell* case can well be applied to the case at bar. Here, as there, the conviction was not based on a statute evincing a legislative judgment that the particular kind of discussion had a tendency to impair the administration of justice—on the contrary, as we have noted, there is a statute which declares the very opposite.* Here, as there, the judgment under review is based on a very general common law concept. And in neither case was there any clear and present danger or other immediate threat to an interest which the state might protect.

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*Quoted on page 3.

If one may venture to draw a generalization from the foregoing cases it might be formulated in the following terms: Any attempt on the part of State authorities to interfere with freedom of expression is void unless the expression is of a character which directly produces a substantial evil which the State has the right to correct or there is a clear danger that the expression, if unpunished, might presently produce such an evil.

In applying this attempted formulation to cases of contempt of Court two considerations must be kept in mind. In the first place, we are concerned only with publications outside the courtroom which are intended to convey information or express an opinion and which may not fairly be characterized as merely abusive of the Court. It is such publications alone for which we claim the constitutional protection. In the second place, we recognize that the State has an interest in the maintenance of its judiciary free from improper influence and that pursuant to such interest the State could, by legislative declaration, punish such interference either as a criminal act or as a contempt of Court and we suppose that judges (at least in the absence of legislation) might devise rules of their own for the protection of this interest of the state just as they have devised such rules in elaboration of the concept of breach of the peace (compare *Cantwell* case, supra).

However, as we have already pointed out, in California there is no statute giving to the courts the power to punish as a contempt expressions of opinion made outside the courtroom. On the contrary, California has a statute which expressly denies such power to the courts.* It is true that California courts have declared this statute to be unconstitutional as an invasion of the "inherent" power of the courts. See *In re Shortridge*, 99 Cal. 526; *Ex Parte Shuler*, 210 Cal. 377. And this view was reiterated by the majority of the Supreme Court of the State in the case

*Quoted on page 3.

at bar (R. 147-152). Similar statutes have been likewise disregarded in most of the other states.*

While we recognize that this Court can have no concern with state decisions interpreting state constitutions, we believe it nevertheless to be within the province of this Court to consider the fact that the Legislature of California has declared a policy contrary to that pursued by the State Court in the instant case and that the State Court in reaching this conclusion relied upon legal doctrine now generally discredited. Indeed, the State Court in reaching its conclusion drew heavily from the now overruled *Toledo Newspaper Company* case (247 U. S. 402). The majority opinion (R. 151) even suggests that that decision denied Congress the power to determine what acts might be punished by Federal courts as contempts.

The doctrine of the "inherent" power of courts to punish summarily publications made outside of court derives, of course, from Blackstone. We will not lengthen this brief with an elaborate discussion of the error of this doctrine. It has been fully treated in many places. See *Fox, The History of Contempt of Court* (1927), *Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts* (1924), 37 Harv. L. R. 1010; *Nelles and King, Contempt by Publication in the United States* (1928), 28 Col. L. R. 401, 525. While this Court did not take occasion to review the English authorities when overruling the *Toledo* decision in the *Nye* case, supra, it recognized that Congress in 1831 sought to restrict the judicial power over contempt of Court. By there giving effective meaning to that legislation this Court

*Such laws were enacted in Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin. They appear to have been disregarded in all the states except Iowa, Minnesota, New York, Oregon, Pennsylvania and Wisconsin. See Appendix to Nelles and King, 28 Col. L. Rev. 554-562; 48 Yale L. J. 54, 58.

has rejected the notion held by so many state courts that there was an inherent power to punish as contempts acts committed outside the presence of the court, a power not subject to legislative curtailment.

And in the recent case of *State ex rel. Pulitzer Publishing Company* v. *Coleman*, 152 S. W. 2nd 640 (Mo., 1941), the Missouri Supreme Court reviewed all of the authorities and reached the conclusion that its own earlier decisions upholding the "inherent" power to punish out of Court publications as a contempt was based on a misunderstanding of legal history and the English authorities. In that case the Court held no contempt had been committed because the case which was under discussion had been closed—the fact that there was another case pending which involved one of the same defendants was held to be immaterial. An attempt was made by relator to obtain a ruling that no publication outside of court could ever be punished as a contempt though the case involved was still pending. The Court rejected that argument stating:

> "Publication of personal and unreasoned criticism of a Court before which a case is pending often tends to substitute trial by newspaper for trial by the Court and jury and would tend to bring about a decision based upon the momentary whim of a publisher or the desire of the mob rather than one based upon the law and the evidence."

It should be noted that in that case the publications complained of were vituperative in the extreme. We do not here contend that no out of court publication may ever be punished as a contempt without violating constitutional guarantees, this not being the forum for discussing the propriety of judicial self-restraint in this field.

We do contend, however, that the mere fact that the case is still pending does not, by itself, solve the problem. If there can be no punishment for contempt at all with

regard to a closed case, the question still remains whether the circumstances of the particular case justify a punishment though the case be pending. And we also wish to make it clear that we do not rest our contention solely upon the summary character of the method adopted. We recognize, as was pointed out in the article by Nelles and King, supra, that the constitutional argument goes beyond the question of summary trial. As was there said at page 407:

> "For the free press question would arise if the sponsors of a publication were tried by indictment instead of by a court without jury."

So we come to the basic question, to what extent is it proper for a state to punish for contempt of Court expressions of opinion with regard to a pending case. As we have already said, we are not here concerned with vituperative or other unreasoned comments. These may well be punished as criminal libels. The fact, however, that the State has the right to punish for criminal libel or for contempt of court cannot justify the conclusion that any statement may be punished as a libel or a contempt. Surely this Court would rule that a true statement, however defamatory, made with good motives or justifiable cause, could not be punished as a criminal libel. So clearly, a true statement concerning even a pending case, however derogatory to the judge involved, could not be punished as contempt of court. Suppose that a judge in the conduct of a case had bullied a witness or in some other way exhibited an arbitrary manner or unjudicial temperament. Surely a reporter might recount such occurrence without fear of punishment for contempt—though the article might well bring the judge involved into high disrepute in the community. Nor should expression of opinion, even about the issues of a pending case, be punishable.*

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*See the excellent statement on this subject in Nelles and King, supra, at 548-552.

So the expression of an opinion concerning the past action of a judge must be free from threat of punishment where the expression does not itself obstruct justice or is not directed toward obtaining from the judge a decision based upon improper considerations. And it should make no difference that, in a technical sense, the case was not closed. The artificial lines sought to be drawn in the case at bar between cases pending and cases determined has no substantial meaning.

Whatever might be the rule with regard to publication before decision—the true application of the "pendency" criterion—to hold that publications may be punished merely because the time for rehearing has not expired exalts form above substance, establishes a criterion lacking in reason and sets up a trap for the unwary. For the layman seldom knows anything about when rehearings are available.* Experience has taught him, moreover, that judges change their minds in a negligible proportion of cases, so that he considers the right to ask for a rehearing illusory.** And there is authority for the proposition that a case is pending until final appeal, authority noted with apparent approval by the lower California court in the *Los Angeles Times* case (see record in this Court, No. 3 of this Term, at p. 109). If such a rule be adopted then no criticism of a lower court decision could ever be safely made. This Court should not permit punishment of publications upon a criterion so mechanical and so devoid of

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*Indeed, petitioner testified, without contradiction, that he knew nothing about any rehearing (R. 116, 122, 123). And it must be remembered, he was not a defendant in the equity action (R. 7, 8, 153).

**Besides, in some courts, there is no fixed period for making such an application. As in the New York Court of Appeals—See Cohen, The Powers of the New York Court of Appeals, p. 286. In *People ex rel. Pierson* v. *Lynch*, 266 N. Y. 431, a motion for reargument was entertained, though denied, one year after the original decision (see 263 N. Y. 533). Moreover, no time is fixed in New York in which an application must be made for reargument of a Special Term decision—which may finally adjudicate rights, as in a proceeding by way of mandamus (see N. Y. Civil Practice Act, Art. 78).

real meaning. Whatever formula may be adopted with regard to permissibly punishable publications, it should be confined to comments before decision.

For criticism of the courts has been one of the continuing privileges of the American way of life. As was said by Mr. Justice Frankfurter in *United States* v. *Morgan*, 313 U. S. :

> "In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press."

It has never been considered contempt of court because the critic may have hoped that his views might have weight with an appellate court or indeed with the same judge upon a subsequent occasion. For it is a commonplace that much criticism, often sharply phrased,* is voiced immediately after the publication of a decision without any thought of possible rehearing or further appeal. Such criticism has been published by officials, by trade union leaders and by interested organizations, such, for instance, as the American Civil Liberties Union. Have these all been subject to punishment? Whatever may be the view with regard to publications concerning cases before a jury verdict there can be no reasonable ground for belief that the freedom and integrity of the courts needs the support of the power to punish for expressions of opinion made out of court.

And that there is no real need for the existence of such power is made clear by the experience of states where, as in California, power has been denied to the courts by

*Sharp indeed were the objections voiced upon this Court's decision in *New York ex rel. Tipaldo* v. *Morehead*, 298 U. S. 587. See New York Times June 2, 1936, 1:6, 7; 19:1-7. Recent instances with regard to lower court decisions are reported in New York Times March 31, 1940, 1:1; 41:1, 2; February 20, 1941, 1:2; 14:2.

the legislature, but where, unlike California, the courts have observed the limitations imposed upon them. In New York, Pennsylvania,* South Carolina and Kentucky, this has been the rule for more than a century (see Nelles and King, supra, 543). Some state courts have, regardless of statute, rejected the "reasonable tendency" rule without any apparent loss in prestige. See *State* v. *American News Co.*, 64 So. Dak. 385; *Nixon* v. *State*, 207 Ind. 426.

Against this background we shall now refer to the opinions in the California courts and the authorities there relied upon. Judge Bishop, while recognizing that petitioner as a labor leader was bound to continue his efforts on behalf of the men whom he represented (R. 45), came to the conclusion that the telegram went beyond the requirements of such duty because it would "inevitably interfere with the orderly administration of justice" (R. 46), although he recognized that it would not cause the judge to change his mind. Judge Bishop did not consider any constitutional issues at all.

However, in the Supreme Court the free speech issue was considered after the Court had declared the publica-

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*The Pennsylvania statute punishes by way of indictment a publication which improperly tends to bias either the public or the Court:

> "If any such publication shall improperly tend to bias the minds of the public, or of the court, the officers, jurors, witness or any of them, on a question depending before the Court, it shall be lawful for any person who shall feel himself aggrieved thereby to proceed against the author, printer and publisher thereof, or either of them, by indictment * * *" (17 Pa. Stat. Ann., Purdon 1930, §2045, Act of 1836, P. L. 784, §27).

The only recorded case arising under this statute is *Comm.* v. *Conroy*, 69 Pittsb. Legal Journal 373 (indictment held sufficient; nature of publication not stated).

In New York the same act, namely, the publication of a "false or grossly inaccurate" account of proceedings may be punished as a contempt (Judiciary Law, §750 [b]) or as a misdemeanor (Penal Law, §600 [7]). Publication of defamatory matter concerning a judge has been held not within these provisions (*People ex rel. Barnes* v. *Court of Sessions*, 147 N. Y. 290; *People ex rel. Supreme Court* v. *Albertson*, 242 App. Div. 450).

tion to be a contempt because it had "a reasonable tendency" to interfere with the orderly administration of justice in pending actions (R. 156). In support of that conclusion it cited three cases from this Court, the *Toledo Newspaper Company* case, which has already been referred to and recently overruled by this Court; *Patterson* v. *Colorado*, 205 U. S. 454, and *Sinclair* v. *United States*, 279 U. S. 749. These cases were also relied upon (R. 158) in rejection of petitioner's contention that the reasonable tendency test was an infringement of his constitutional rights and that there should be applied either the "clear and present danger" test or the principle that there could be no punishment for contempt in the absence of actual obstruction.

Of course, the *Sinclair* case has no application whatever to the situation involved in the case at bar since the contempt there charged was not a publication but an attempt to tamper with a jury. The California Supreme Court (R. 157) erroneously attributes to the opinion of Mr. Justice McReynolds in that case a long quotation which is actually a quotation from the now overruled *Toledo* case, though later incorporated in the *Sinclair* opinion.

Patterson v. *Colorado*, supra, requires more detailed consideration. The charge of contempt in that case arose from the publication of certain articles and a cartoon which reflected upon the motives and the conduct of the Colorado Supreme Court in cases there pending which had to do with the tenure of office of the Governor and other officials of the state. In effect, the articles charged that the Court was involved in a scheme to unseat Democrats and replace them with Republicans. The publisher of the articles claimed that the charges were true and that he had a constitutional right to make them.

As already noted, Mr. Justice Holmes, speaking for the majority of the Court, doubted whether the Fourteenth Amendment protected the right of freedom of speech against State action. He reached the conclusion, moreover, that

even if it did it went no further than to protect against previous restraints. Beyond indicating that truth would not be a defense in contempt any more than it might be in criminal libel, the opinion of Mr. Justice Holmes contains no real discussion whatever of the free speech issue. It is true that Mr. Justice Holmes pointed out that our system of trials required that the conclusions of a jury or a judge should be "induced only by evidence and argument in open Court and not by any outside influence, whether of private talk or public print", and that he recognized "the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation." It is significant, however, that this Court dismissed the writ of error for want of jurisdiction on the ground that there was no substantial Federal question.

From this decision Justices Harlan and Brewer dissented. Mr. Justice Brewer confined himself to a declaration that the Federal question was substantial and should be considered on its merits. Mr. Justice Harlan went further and expressed the definite opinion that the Fourteenth Amendment guaranteed against State impairment of freedom of speech or of the press and that the action of the lower Court was in violation of these rights.

It is clear, therefore, that this Court has never considered on its merits the basic contentions involved in the case at bar. While there are statements in Mr. Justice Holmes' opinion in the *Patterson* case which tend to support the position of the California courts, it is submitted that more recent decisions of this Court require an entirely different approach to the problem here presented.

In addition to the cases already referred to, this Court's attention is called to *Craig* v. *Hecht*, 263 U. S. 255. Chief Justice Taft there stressed that punishment for contempt was proper when the publication "is intended and calculated to obstruct and embarrass the Court." The merits were, however, not discussed by the Court.

We submit, therefore, that a publication containing an expression of opinion concerning judicial conduct cannot be punished, either by way of contempt or by indictment and regardless of whether or not the case is still pending except when the publication actually obstructs or was intended improperly to obstruct the administration of justice, or perhaps, regardless of intent, under unusual circumstances where it is clear from the circumstances that there was a danger that substantial obstruction of justice would result from the publication. Guided by these principles the courts should be able to preserve their independence without interfering with the right of the citizen to criticize. The judge would be protected from direct solicitation for a particular decision in a particular case; he would not be protected from criticism of the decision. The courts and the public would also be protected in situations of peculiar delicacy from publications not directly intended to produce improper judicial action but which in those peculiar circumstances would have such result. Thus criticism of judicial action would normally be possible free from threat of punishment.

Any other rule would leave the citizen at the mercy of changing standards of judicial sensitiveness. And when the history of prosecutions for contempt for publication is reviewed, as was done by *Nelles and King*, supra, page 533, and by *Thomas, Problems of Contempt of Court* (1934), it should be plain that much proper criticism of the courts has been punished as contemptuous.* It is time that this Court laid down a rule in this field for the guidance of the judiciary throughout the country as it has already done in the field of street meetings, leaflet distribution and labor injunctions.

For this Court to approve the rule laid down by the California courts in this and the companion *Los Angeles Times* case, supra, would perpetuate the evils long ago

*We have collected some examples in an Appendix.

decried by Jefferson: In the Virginia Statute on Religious Liberty he exposed the fallacy of the doctrine that expressions could be punished because of their harmful tendency:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all * * * liberty, because he, being, of course, judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own." (Italics ours.)

And to approve the decision below would also disregard the decision of this Court in the *Herndon* case, supra. There this Court rejected an interpretation of a state statute aimed at punishing insurrection which would have permitted such punishment for the utterance of words merely because of their tendency to produce insurrection. Mr. Justice Roberts said:

> "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed" (p. 263).

So here, the "reasonable tendency" test will enmesh anyone who criticizes a judicial decision immediately after it is rendered if a judge can be persuaded that the critic ought to have foreseen that his words might have some effect on the judge criticized or on the public reaction to courts in general.

Surely if the state may not punish one charged with attempting to overthrow it on a showing only of reason-

able tendency to accomplish that unlawful end it should have no right to punish for the much less serious offense of contempt on a showing of like character.

The vagueness of the reasonable tendency test was recognized by Judge Gibson, dissenting in the *Times-Mirror* case, 15 Cal. 2d 99 at 124, 125:

> "• • • Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.
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> This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views.
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> In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge.
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> In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually in-

terferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient. Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding."

By accepting the test laid down in the latter part of this quotation as a constitutional standard marking the permissible bounds for the punishment of out of court publications, whether by the summary method of contempt or the ordinary form of criminal trial, this Court would lay at rest the great popular discontent which has, from our earliest history, accompanied such prosecutions.

POINT III.

There was no justification for the punishment in the case at bar.

1. If the contentions previously advanced be accepted by this Court then it must follow that the publication here complained of was not properly punishable. There is no contention that there was here any actual obstruction of justice. Moreover, any claim that there was an intent on the part of petitioner to influence the action of the judge in the equity action has been eliminated. For Judge Bishop expressly found to the contrary, saying:

> "I do not think it (referring to the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

And he said that he would consider the petitioner's culpability more serious "if I did not believe that Mr. Bridges

had no intent in sending this telegram to influence the judge" (R. 48). Judge Bishop thought that it was petitioner's purpose not merely to notify the Secretary of Labor of the Union's reaction to a court decision, but also to advise employers and employees that the matter was "being energetically watched" (R. 47). Thus, if the direct intent to obstruct justice be a requisite element of a constitutionally punishable publication, such element is here lacking.

Nor were there here any special facts and circumstances which would justify the inference that there was any clear danger that obstruction of justice would result from the publication. It is true that the majority of the California Supreme Court considered that certain statements in the telegram constituted threats to tie up the ports of the Pacific Coast (R. 156). But it should be noted that the statements contained in the telegram were expressed, not with the purpose of interfering with the administration of justice, but with the hope that the agencies at the disposal of the Secretary of Labor of the United States would find a means of solving the controversy between the two competing unions in a forum other than the judicial one. This view was amplified in the answer of petitioner (R. 42) and in petitioner's testimony (R. 110 and following). Surely, such an attempt on the part of petitioner to obtain a solution of the problems involved was proper and cannot be the subject of any criticism.

It should be borne in mind, moreover, that the union of which petitioner was President, had an agreement with various waterfront employees (R. 36, 41, 113). And it was believed that the decision of the State Court in the equity action would disrupt labor relations then existing (R. 109-119). The purpose of the telegram was to point out to the Secretary of Labor the seriousness of the situation which would result if the plaintiffs in the equity action sought to take advantage of the decision there rendered, just as there might be a similar serious situation if an

employer made an agreement with a small minority of his employees in disregard of the wishes of the majority. In both cases it would be the function of the Secretary of Labor, through the various existing agencies of mediation and conciliation, to prevent the advantage obtained by the minority from being so exercised as to result in industrial conflict. There is nothing in the circumstances of this situation, therefore, to justify the inference that there was a clear danger that obstruction of justice would result from the publication of the telegram in question.

2. But regardless of all other considerations, it is submitted that the sending and publication of the telegram to the Secretary of Labor were the exercise of the right to petition the national government on a matter of national concern.

It should be noted that a similar telegram was sent to two other agencies of the federal government: to the Chairman of the National Maritime Commission and the Chairman of the National Labor Relations Board (R. 109, 110), both agencies interested in the preservation of industrial peace. And petitioner testified, without contradiction, that he had been requested by these agencies and the Labor Department to keep them informed of situations which might endanger industrial peace (R. 110, 112). His further testimony (R. 116, 117, 118) that he had no intention to influence the action of Judge Schmidt in connection with the equity action (having indeed no knowledge of the possibility of a rehearing—R. 116, 122, 123) was expressly accepted by the Judge who tried the contempt charge (R. 47, 48).

It is submitted, therefore, that the state of California had no power to restrict this exercise of the right of petition by punishing it as a contempt. That the right of petition like that of assembly, is protected by the due process clause of the Fourteenth Amendment can hardly be doubted (cf. *deJonge* v. *Oregon*, supra). And when the

petition is addressed to the national government on an issue of national concern, it is also protected by the privileges and immunities clause of the Fourteenth Amendment (cf. *Hague* v. *C. I. O.*, supra, *United States* v. *Cruikshank*, 92 U. S. 542). While this right may be subject to the police power of the state for the preservation of order it cannot be infringed, where, as here, it is established there was neither actual obstruction of public justice nor any intent to cause such obstruction.

The "high constitutional privilege" of the right of petition has often been recognized. In addition to the cases cited on page 27 of the brief originally filed herein, this Court's attention is called to *McKee* v. *Hughes*, 133 Tenn. 455, *Yancey* v. *Comm.*, 135 Ky. 207 and *In re Stolen*, 193 Wisc. 602. In the last of these cases a "petition" addressed by a group of lawyers to a court considering a disbarment proceeding was held improper (although no action was taken to punish anyone), but only because it was directly intended to influence the court in a case yet undetermined. In the other two cases petitions to public authority were held privileged in the absence of proof of malice—i. e., of a specific intent to injure the party alleged to have been defamed. By analogy, therefore, there should be no punishment for contempt in the absence of proof of a specific intent to influence the court improperly, an absence here established affirmatively.

The California Supreme Court appears to have recognized the force of the argument based on the right of petition, for it said that the punishment was not for sending the telegram, but for its publication (R. 160). That, we submit, is a narrow view of the right of petition, especially with regard to a matter of national concern, a matter involving many thousands of members of petitioner's union (see R. 109) scattered far and wide in this country and on the high seas. They were surely entitled to know what steps their president was taking on their behalf, as was also the general public which had a vital interest in averting industrial conflict on the waterfront.

While the state must have the power to protect itself against any abuse of the right of petition, even to the national government, it certainly cannot restrict that right by burdening it with punishment merely because of a supposed "reasonable tendency" that harm might result to a state agency from the publication of the petition.

Under all the circumstances, therefore, the sending and publication of the telegram in question was an exercise by petitioner of his constitutional rights of freedom of expression and to petition his government, an exercise free from any intent to obstruct state justice and, therefore, beyond the power of the state to punish.

CONCLUSION.

It is respectfully submitted that the conviction should be reversed on the ground that petitioner's rights under the United States Constitution have been infringed.

Respectfully submitted,

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APPENDIX.

(The cases are arranged chronologically.)

Sturoc's Case (47 N. H. 428—1869).

Pending a liquor prosecution a lawyer wrote a letter to a newspaper criticizing the issuance of a search warrant by which the prosecution was started and the construction of the law which permitted the prosecution to be instituted by a person residing in a town not affected. Held contemptuous as tending to bring the prosecution and its promoters into odium.

The Craig Case (266 Fed. 230, 279 Fed. 900; 274 Fed. 177, 282 Fed. 138, 263 U. S. 255—1920-1923).

Craig, then Comptroller of the City of New York, published a letter criticizing the refusal of Judge Mayer to appoint a co-receiver of the transit lines satisfactory to the City. Because he sought review by habeas corpus instead of appeal he failed in the courts, L. Hand, J., dissenting in the C. C. A.; Holmes and Brandeis, JJ., in the Supreme Court. He was pardoned by President Coolidge.

The Sanders Case (290 Fed. 428—1923).

After contempt proceedings had been instituted against one Cohen for violation of a labor injunction by a publication which called strikebreakers scabs (285 Fed. 633), one Sanders published an article declaring that the court had no right to muzzle expression of opinion on questions uppermost in the public mind. He was found guilty.

The Francis Case (11 F. 2nd 860—1926).

After a judge who had been libelled had convicted the author of the libel he published a protest against a judge sitting in judgment in such a case. Although final judg-

ment had been rendered in the criminal action the punishment was affirmed by the C. C. A. for the Third Circuit on the ground that the publication "aimed to prejudice a court in public estimation."

The Shumaker Case (200 Ind. 623—1926-1928).

The Anti-Saloon League in an official report condemned the decisions of certain Supreme Court judges of Indiana as "wet", largely because they had joined in reversing convictions under the liquor laws by far fetched findings that the convictions had rested on evidence obtained as the result of unconstitutional seizures. The State Supreme Court held this to be contemptuous in a 3-2 decision and (200 Ind. 716) ruled that the Governor had no power to pardon, the same two judges dissenting. (On that point this Court had reached a different conclusion with regard to the Presidential pardoning power: *Ex parte Grossman*, 267 U. S. 87.)

The Megill Case (114 N. J. Eq. 604—1933).

After a vice-chancellor had approved the accounts of a receiver the commissioners of Bradley Beach adopted a resolution, later given newspaper publicity, which criticized the approval because the Borough's tax claim had not been paid. This was held to be contemptuous on the theory that the error should have been reviewed on appeal, not by hue and cry in the press.

The Woodbury Case (295 Mass. 316—1936).

Members of a defense committee in a circular asking for funds, stated that defendant had been framed by a rival faction of his union. The circular was sent out before the trial; it made no reference to the court. Held contemptuous as calculated to impair the fairness of the trial. (See 50 Harv. L. R. 355 and 46 Yale L. J. 1250 doubting wisdom of decision.)

The Los Angeles Times Case (15 Cal. 2nd 99—1938-1940).

In addition to the four editorials which form the basis of the charge in the case now before this Court, proceedings for contempt were instituted based on two editorials which criticized the Bar Association committee for having brought on the first proceeding. Judge Wilson found these editorials contemptuous because they might intimidate officers of the court in the performance of their duties. (See record in No. 3 of this Term, p. 117.) The Supreme Court of California rejected this reasoning (id. p. 139). See 48 Yale L. J. 54 criticizing lower court decision.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 1[redacted] 1

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

PAGE

Preliminary statement 1

I.

The instant petition presents no federal question 2

What constitutes contempt is a matter of local law 2

Application of Fourteenth Amendment to contempt 6

Patterson v. Colorado is controlling 8

Finality of contempt judgment is essential to independence of contemned court 11

II.

The "clear and present danger" doctrine is not applicable to contempt 13

There is a manifest distinction between abridging free speech and punishing its abuse 13

The clear and present danger doctrine was not designed for application to contempt 16

The true purport of the doctrine 18

The doctrine, as advanced by petitioner, is not essentially different from the reasonable tendency rule 19

Either doctrine presents a mere question of fact 21

Herndon v. Lowry does not support petitioner's position 23

Reasonable tendency is a common law standard, not a newly created criterion of guilt 24

PAGE

III.

Actual obstruction of the court processes is not an acceptable test of contempt 27

IV.

Petitioner has not been denied his constitutional right to petition the Government for a redress of grievances 28

V.

The right of petitioner to pursue a lawful occupation has not been denied or impaired 32

VI.

Petitioner has no right to a review of the evidence herein 33

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Abrams v. United States, 250 U. S. 616 13

Associated Press v. National Labor Relations Board, 301 U. S. 103 17

Bell Telephone Co. v. Pennsylvania P. U. Commission, 84 L. Ed. (Adv. Op.) 412 8

Bessette v. W. B. Conkey Co., 194 U. S. 324 11

Blackmer v. United States, 284 U. S. 421 6

Caminetti v. United States, 242 U. S. 470 29

Cincinnati Street Railway Co. v. Snell, 193 U. S. 30 5

Cline v. Frink Dairy Co., 274 U. S. 445 25

Cooke v. United States, 267 U. S. 517 6

Craig v. Hecht, 263 U. S. 255 20

Debs, Re, 158 U. S. 564 12

DeJonge v. Oregon, 299 U. S. 353 13

Eilenbecker v. District Court, 134 U. S. 31 6

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 4, 5

Fisk, Ex parte, 113 U. S. 713 11

Gasquet v. Lapeyre, 242 U. S. 367 10

Gitlow v. New York, 268 U. S. 652 ..... 13, 14, 16, 18

Gould, Ex parte, 99 Cal. 360 29

Herndon v. Lowry, 301 U. S. 242 ..... 13, 17, 23

International Harvester Co. v. Kentucky, 234 U. S. 216 ..... 25, 26

Kearney, Ex parte, 7 Wheat. 38 11

Lindsley, In 75 Cal. App. 122 3

Lindsley v. Superior Court, 76 Cal. App. 419 3

Lovell v. Griffin, 303 U. S. 444 13

PAGE

McKee v. United States, 133 Tenn. 455 30

Michaelson v. United States, 266 U. S. 42 6

Milwaukee, etc. Co. v. Wisconsin ex rel Milwaukee, 252 U. S. 106 6

Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 84 L. Ed. (Adv. Op.) 477 26

Missouri v. Lewis, 101 U. S. 22 ..... 4, 5

Myers v. United States, 264 U. S. 95 6

Nash v. United States, 229 U. S. 373 24

Near v. State of Minnesota, 283 U. S. 697 ..... 3, 13

Newport Light Co. v. City of Newport, 151 U. S. 527 10

Owen v. Dancy, 36 Fed. (2d) 882 10

Patterson v. Colorado, 205 U. S. 454 ..... 8, 10, 11, 33

Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511 5

Powell v. Pennsylvania, 127 U. S. 678 5

Raffel v. United States, 271 U. S. 494 29

Riley v. Worcester County Trust Co., 89 Fed. (2d) 59 6

Robinson, Ex parte, 86 U. S. 505 6

San Francisco Chronicle, In re, 1 Cal. (2d) 630 3

Savin, Ex parte, 131 U. S. 267 6

Schenck v. United States, 249 U. S. 52 ..... 13, 15, 27

Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 5

Shuler, In re, 210 Cal. 377 3

Sinclair v. United States, 279 U. S. 749 ..... 3, 16, 23

Stolen, In re, 193 Wis. 602 30

Times-Mirror Publishing Co. v. Superior Court, 99 Cal. Dec. 102, 98 Pac. (2d) 1029 ..... 7, 8, 10, 27, 32

Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 3, 16, 17, 18, 23

PAGE

Truax v. Corrigan, 257 U. S. 373 ..... 4, 5

Tumey v. State of Ohio, 273 U. S. 510 ..... 5, 6

United States v. Cohen Grocery Co., 255 U. S. 81 24

United States v. Moore, 287 Fed. 879, certiorari denied 264 U. S. 581 6

Vanarsdale v. Laverty, 69 Pa. St. 103 30

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 24

Whitney v. California, 274 U. S. 373 ..... 13, 15

STATUTES.

California Constitution, Art. I, Sec. 9 2

California Political Code, Sec. 4153, Subd. 9 1

TEXTBOOKS AND ENCYCLOPEDIAS.

Robertson and Kirkham on Jurisprudence of the Supreme Court of the United States, Sec. 99, p. 178 34

Robertson and Kirkham on Jurisprudence of the Supreme Court of the United States, Sec. 101, p. 183 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.
No. 759.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The title of this proceeding is incorrect. The State of California is not properly named as respondent, for contempt is not a criminal proceeding under the state law.[1] The Attorney General of the State has refused to appear, for no service has been made upon him in accordance with Rule 38.[2]

The Bridges contempt proceeding has been prosecuted by a committee of the Los Angeles Bar Association on behalf of the Superior Court under formal appointment of the court [R. 49] and in conjunction with the County Counsel of Los Angeles County who has also appeared pursuant to statute[3] and request of the court.

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[1]See Supreme Court opinion at R. 139-145.

[2]See affidavit of Attorney General Earl Warren attached hereto and bound herein.

[3]Cal. Pol. Code, Sec. 4153, Subd. 9.

As the petition, record and brief, together with notice of filing, were served upon the members of the committee, who made written acknowledgment of service thereof without observing the substitution of a new respondent, we are content to treat the title of the proceeding as erroneous and to present this brief on behalf of the real respondent.

I.

The Instant Petition Presents No Federal Question.

What Constitutes Contempt Is a Matter of Local Law.

The California Constitution provides in section 9, Article I:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*;[1] and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

The California Supreme Court in its opinion in this case said, at R. 159:

> 'It may be conceded that all that has been said in these briefs as to the importance of the right of free speech and of a free press in a democracy meets with the approval of this court. In fact, we are in thorough accord with petitioner's claim that the right of free speech and of a free press are among the greatest bulwarks of the freedom which, as citizens of this country, we enjoy. But as was said in a recent decision of the Supreme Court of the United States, 'the right (of free speech) is not an absolute one, and the

[1]All italics ours, unless otherwise indicated.

> State in the exercise of its police power may punish the abuse of this freedom.' (Stromberg v. California, 283 U. S. 359, 368.)"

And it found upon the facts presented that there had been *an abuse of that right* by petitioner. [R. 156, 159.]

The ultimate and essential claim of petitioner is that fundamental rights have been denied him by holdings of two state courts that the facts at bar measure up to the standard of contempt which has been announced, accepted and applied as the state law for many years past,[1]—a criterion which happens to correspond to the one heretofore adopted by this court.[2] And petitioner would have this court first reverse itself and then hold that the state court had denied due process or equal protection of the laws[3] because it applied the standard of guilt which has prevailed in the California courts and in the United States tribunals since the formation of the state and federal governments, respectively.

This contention, for several reasons, presents no federal question of any substantiality. In the first place it ignores the sovereign power of the state and the restricted nature of the grant of powers to the United States. It is well settled that each state may set up its own body of juris-

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[1] *In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637; *In re Shuler*, 210 Cal. 377, 402; *In re Lindsley*, 75 Cal. App. 122, 124; *Lindsley v. Superior Court*, 76 Cal. App. 419, 428.

[2] *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 421; *Near v. State of Minnesota*, 283 U. S. 697, 715; *Sinclair v. U. S.* 749, 764.

[3] It is the Fourteenth Amendment, not the First, that affords protection against state denial of freedom of the press or freedom of speech. *Near v. Minnesota*, 283 U. S. 697, 707.

prudence, whether it be the civil law, the common law, or a hybrid form such as is exemplified by the community property system in the common law state of California.[1] In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, this court recently said:

> "And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Quoting Mr. Justice Field, it was further said that the Constitution of the United States:

> "'* * * recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence,'"

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[1]See *Missouri v. Lewis*, 101 U. S. 22, 31; dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. at 372-74.

and quoting Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *
>
> " '* * * the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' "

The state may define crimes or lawful conduct as it sees fit.[1]

The powers of its own courts are within its exclusive keeping, not subject to federal control.[2]

The substantive law of the state is binding upon this court in all types of cases, subject only to the narrow exception of "matters governed by the federal Constitution or by acts of Congress."[3]

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[1]See *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 67-69; *Powell v. Pennsylvania*, 127 U. S. 678.

[2]*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Tumey v. State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion.

[3]*Erie R. Co. v. Tompkins*, 304 U. S. at 78.

Application of Fourteenth Amendment to Contempt.

For the purposes of this case, the only limitation upon the foregoing propositions is the requirement that due process of law or equal protection of the laws must not be denied. But "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions * * * any more than, in guaranteeing due process, it assures immunity from judicial error * * *." (*Milwaukee, etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)[1]

To determine what is due process in contempt proceedings we must look, of course, to the standards which were recognized at the time of adoption of the federal Constitution.[2] Such investigation discloses that, as the power is an inherent one, necessary to the independence of each court,[3] the demands of due process are met by adequate notice of hearing and opportunity to be heard,[4] both of which requisites were manifestly present here.

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[1]See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66.

[2]*Eilenbecker v. District Court*, 134 U. S. 31, 38; *Tumey v. State of Ohio*, 273 U. S. at 523.

[3]*Michaelson v. U. S.*, 266 U. S. 42, 65; *Myers v. U. S.*, 264 U. S. 95, 103; *Ex parte Robinson*, 86 U. S. 505, 510.

[4]*Cooke v. U. S.*, 267 U. S. 517, 537; *Blackmer v. U. S.*, 284 U. S. 421, 440; *Eilenbecker v. District Court*, 134 U. S. 31, 39; *Ex parte Savin*, 131 U. S. 267, 278; *U. S. v. Moore*, 287 Fed. 879, 883, certiorari denied in 264 U. S. 581.

The proceeding was initiated by order to show cause on February 24, 1938, followed by two like orders which it was impossible to serve [R. 31]. Finally it went to trial upon an order to show cause made on May 24, 1938 [R. 32]. Petitioner interposed a motion to quash in July, 1938 [R. 32-39]; he likewise demurred [R. 40] and answered [R. 41]. The demurrer was sustained as to the first charge on August 16th [R. 49, 137]. A trial upon the facts was had on September 6, 7, 12 and 13, 1938 [R. 49], and petitioner Bridges testified in his own behalf [R. 108]. The trial judge on the 13th rendered his decision [R. 43] exonerating Bridges of the charge of the third count [R. 50] and adjudging as to the second count that "the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court." [R. 52.] A petition for writ of review having been filed in the Supreme Court of California, same was denied on December 1, 1938 [R. 126], but upon petition for rehearing that ruling was vacated and the writ was issued on December 29, 1938 [R. 126]. The matter was then carefully considered upon the arguments and briefs presented to the Supreme Court and also in the light of the arguments made in the case of *Times-Mirror Company v. Superior Court* [R. 161]. It was finally decided on October 16, 1939 [R. 136].

So far as equal protection of the law is concerned it appears from the petition herein that the Times-Mirror Company has had the same result in a cause which petitioner claims to present substantially the same questions

as at bar (*Times-Mirror Publishing Co. v. Superior Court*, 99 Cal. Dec. 102, 98 Pac. (2d) 1029). Even if it were to be conceded that there was error in the application of the state law to the facts at bar, that would not raise a constitutional question for, as said in the *Milwaukee* case, *supra*, the 14th Amendment does not "assure uniformity of judicial decisions" or "immunity from judicial error". In *Bell Telephone Co. v. Pennsylvania P. U. Commission*, 84 L. Ed. (Adv. Op.) 412, this court said:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of the state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Patterson v. Colorado Is Controlling.

The question now presented—whether a finding of contempt of the state court presents a federal question—was specifically decided by this court in *Patterson v. Colorado*, 205 U. S. 454. That case dealt with a contempt by publication in a newspaper. A writ of error to review the conviction in the state court was dismissed for want of jurisdiction, this court speaking through Mr. Justice Holmes. The decision proceeded upon the postulate that "The only question for this court is the power of the state" (p. 460); and the court said in part:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged.

Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.

"It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.* Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt,* as well as the time during which it may be committed, *is a matter of local law.*"

Again at page 463:

"It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. City of Newport, 151 U. S. 527;

Owen v. Dancy, 36 Fed. (2d) 882, 884;

Gasquet v. Lapeyre, 242 U. S. 367, 369.

Viewing the instant proceeding in the light of the *Patterson* decision, it should first be noted that the contempt was committed with reference to a matter pending before Judge Schmidt but the charges were heard by Judge Bishop [R. 50, 52, 56]. Certainly the rulings of the trial judge exonerating petitioner of two of the three charges, and his restrained and considerate expression of views in connection with the finding of guilty on the other [R. 44-48], cannot be said to approach the laying hold upon "innocent conduct * * * as an arbitrary pretense for an arbitrary punishment". And no more can the procedure in the Supreme Court be so characterized. The granting of a rehearing and issuance of a writ of review after same had been once denied, its long deliberation upon the case (from December, 1938 to October, 1939), its study of same in connection with the similar case of the *Times-Mirror Company*, all lead to but one conclusion, that petitioner had at every stage of the cause the utmost consideration and that he was finally convicted only after mature and dispassionate deliberation. The conviction of the Times-Mirror Company in the same type of cause and through application of the same "reasonable tendency" test is conclusive proof that the state laws have been applied equally. And as for notice and opportunity to be heard, the record speaks in no uncertain terms.

Finality of Contempt Judgment Is Essential to Independence of Contemned Court.

And the *Patterson* decision is obviously sound for a certiorari would first review the findings of the state courts upon questions of fact and state law and, if decided favorably to petitioner, would impose upon them the judgment of this tribunal as to what constitutes contempt of the courts created by and functioning under the laws of the sovereign state of California,—thus impairing their inherent power and duty of self-protection.

Ex parte Kearney, 7 Wheat. 38, 44:

"The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others."

Bessette v. W. B. Conkey Co., 194 U. S. 324, 330:

"At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters. In Crosby's Case, 3 Wils. 188, Mr. Justice Blackstone said:

" 'The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court.' "

Ex parte Fisk, 113 U. S. 713, 718:

"There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to

this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

Re Debs, 158 U. S. 564, 595:

"And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And this is the law in California. An adjudication of contempt is reviewable in an appellate court only to the extent of determining whether the evidence supporting the judgment is sufficiently substantial to sustain the jurisdictional finding [see opinion herein at R. 152-153].

Whether the Superior Court of Los Angeles County and the Supreme Court of California have misapplied the law to the facts is not for this court to say, for that is not a federal question.

II.

The "Clear and Present Danger" Doctrine Is Not Applicable to Contempt.

Even if this court could properly review the intrinsic merit of the state law of contempt and, through reversing itself, impose a new law upon the State of California, there would be no good ground for so doing.

There Is a Manifest Distinction Between Abridging Free Speech and Punishing Its Abuse.

The cases upon which petitioner relies[1] are in no instance concerned with contempt of court. They deal with statutory *abridgments* of free speech, not with subsequent punishments for *abuses* of that right, such as the recognized instances of libel, slander and contempt.

Near v. State of Minnesota, 283 U. S. 697, 708:

> "Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. Whitney v. California, 274 U. S. 357, 362, 373, 71 L. Ed. 1095, 1100, 1105, 47 S. Ct. 641, *supra*; Stromberg v. California (283 U. S. 359, *ante*, 1117, 73 A. L. R. 1484, 51 S. Ct. 532), *supra*. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty."

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[1] *Schenck v. U. S.*, 249 U. S. 52; *Abrams v. U. S.*, 250 U. S. 616; *Gitlow v. N. Y.*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; and *Lovell v. Griffin*, 303 U. S. 444.

At page 713:

> "The question is whether a statute authorizing such proceedings in restraint of publication is *consistent with the conception of the liberty of the press as historically conceived and guaranteed.*"

Considering the matter in its historical aspect, the court further said, at page 715:

> "But it is recognized that punishment for the *abuse* of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

And at page 720:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The principles announced in the *Near* case are impliedly recognized in all of the "clear and present danger" pronouncements upon which petitioner relies.

Gitlow v. New York, 268 U. S. at 666:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is

secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. (Citing 10 authorities.) Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the Republic.

"That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. (Citing 9 authorities.)"

Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. at 373, said:

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute."

And Mr. Justice Holmes, in *Schenck v. U. S.* (249 U. S. at 52) said:

"But the character of every act depends upon the circumstances in which it is done * * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."

The Clear and Present Danger Doctrine Was Not Designed for Application to Contempt.

Petitioner makes no claim that this doctrine which he now advocates has been applied by this court or any other to contempt proceedings. And it is significant that the justices of this court who evolved and insisted upon its application to abridgements of free expression of political or like views, made no attempt to extend the doctrine to contempt proceedings but actually joined in decisions which, by adopting the reasonable tendency standard, operated to exclude it.

Toledo Newspaper Co. v. U. S., 247 U. S. 402, was decided in 1918, and, in the face of a dissent by Mr. Justice Holmes and Mr. Justice Brandeis, it adopted and applied the reasonable tendency test. The dissenting justices made no attempt to inject the clear and present danger doctrine, and contented themselves with a discussion of the proper construction of the pertinent federal statute. This new doctrine was first brought forward in the *Schenck* case (249 U. S. 52) decided at the next term. Although one or both of these justices pressed the doctrine for application in the *Abrams*, *Gitlow* and *Whitney* cases (decided in 1919, 1925, and 1927, respectively), they concurred in the decision of *Sinclair v. U. S.*, 279 U. S. 749 (decided in 1929), which again reiterated and applied to a contempt proceeding the *Toledo Newspaper Co.* rule that "the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject", which rule is again phrased at page 764 as follows:

> "But here again not the influence upon the mind of the particular judge is the criterion, but the reason-

able tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case."

This doctrine was adopted at the instance of Mr. Justice Roberts, who then appeared as counsel for the United States and successfully urged the affirmance of the conviction, relying largely upon the *Toledo Newspaper Company* case.

Moreover, Mr. Justice Roberts, who spoke for the court in applying the clear and present danger rule in *Herndon v. Lowry*, delivered at the same term the opinion in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 131-133, wherein he rejected the contention that the National Labor Relations Act as applied to the Associated Press was in restraint of freedom of the press, and said in part:

"Does this statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the first amendment? We hold that it does not. * * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of Court."

In support of the foregoing statement there is cited only the case of *Toledo Newspaper Co. v. United States*. And Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo joined in forming a majority of the court in that instance.

The True Purport of the Doctrine.

The clear and present danger doctrine, as stated from time to time, has called for an imminent danger of overthrow of organized government. For instance, Mr. Justice Holmes, dissenting in the *Abrams* case, said (250 U. S. at 630):

> "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

And in *Gitlow v. New York*, Mr. Justice Holmes and Mr. Justice Brandeis (268 U. S. at 673) said:

> "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendants' views,"

and

> "If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question."

If the doctrine were applied in this extreme sense to contempt proceedings it would result absurdly, for successful

influence of one judge or two judges or a dozen judges would have no direct and immediate tendency to destroy the government as a whole. Not until the great majority of the judges had been subjected to the will of a Bridges or a Los Angeles Times would the foundations of the republic or of the sovereign state of California be in imminent danger of destruction, and hence there could be no contempt until the court in its entirety, or in its greater part, had been robbed of its independence through extraneous influences.

The Doctrine, as Advanced by Petitioner, Is Not Essentially Different From the Reasonable Tendency Rule.

Petitioner no longer relies upon the extreme statement of the doctrine. He now rests upon Mr. Justice Brandeis' statement in the *Whitney* case:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Petitioner's Brief, p. 14.)

And petitioner's brief shows that the doctrine as applied to contempt distills itself into the same thing as the reasonable tendency doctrine against which counsel for petitioner inveigh. Under this statement of the rule there is necessary to lawful restraint of speech only "a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." And at pages 14-15 of his brief petitioner points out that "the courts have the authority and the obligation to safeguard themselves from * * * outside influences concerning pending cases;"

and that "Interferences with the judiciary admittedly constitute 'substantive evils' which the courts may constitutionally penalize." Clearly then protection against "outside influences concerning pending cases" is the thing against which the state, through its courts, may protect itself whenever there appears "a clear and imminent danger" of such influences being brought to bear upon such pending cases. We have then a question of fact as to whether "a clear and imminent danger" of influencing the court exists (according to petitioner's test) as opposed to a question of fact whether the extraneous influence has a "reasonable tendency" to effect that result. And, as Mr. Justice Holmes said in the *Schenck* case, "It is a question of proximity and degree." The court there held that the evidence was sufficient to justify the lower federal court in finding that the defendant's act did create "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" and in so doing stressed the "tendency" of the documents in question to influence others to obstruct the recruiting service of the army. (See pages 51-52.)

It is interesting to note that the *amicus curiae* brief of American Civil Liberties Union herein suggests that the appropriate criterion is "a *reasonable apprehension* that the independence of the judiciary was being challenged by the comment complained of" (p. 4) and that "it should be necessary to find a *strong probability* that interference would result from the act charged before punishment is meted out" (p. 4). Commenting upon *Craig v. Hecht*, 263 U. S. 255, it is further said in effect, at page 6, that the court there recognized the impropriety of comment upon pending cases "when it is quite clear that the comment has a *direct tendency* to obstruct."

Either Doctrine Presents a Mere Question of Fact.

Mr. Justice Brandeis in the *Whitney* case, advocating the application of the clear and present danger doctrine, says that (274 U. S. at 374):

> "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."

In any event, the question of whether the requisite "clear and imminent danger" is present is one of fact for the trial court to determine. And its existence is inherent in the finding of Judge Bishop, the trial judge, at R. 52:

> "That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending."

And the conclusion deduced therefrom was that:

> "by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court."

As Mr. Justice Brandeis (Mr. Justice Holmes concurring) pointed out in the *Whitney* case, there is no fixed standard for determination of the existence of "a clear and imminent danger" and the matter must be determined as one of fact in the trial court. In that instance these concurring justices held that, notwithstanding the erroneous reasoning of the trial judge, his ultimate finding was sustained by competent evidence and hence should be affirmed. At pages 378-9 it was said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied."

And:

> "On the other hand, there was evidence on which the court or jury might have found that such danger existed. * * * In the present case, however, there was other testimony which *tended* to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity

> of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed."

We again quote the American Civil Liberties Union:

> "But the problem cannot be solved by the application of any precise formula of words. Much will depend on the temper of the comment under scrutiny and the setting in which it was uttered." (P. 6.)

Whether we apply the test of reasonable tendency to interfere with judicial proceedings or clear and imminent danger of interference therewith, we have a question of fact presented in each contempt proceeding and it is, we submit, competent for the court to conclude that a publication which has the specified tendency also presents clear and imminent danger "of some substantive evil which the state constitutionally may seek to prevent." As applied to contempt, petitioner's clear and present danger doctrine possesses nothing of substance different from the criterion laid down in the *Toledo Newspaper* case, the *Sinclair* case, and in the State of California.

Herndon v. Lowry Does Not Support Petitioner's Position.

The claim that the reasonable tendency doctrine was rejected by *Herndon v. Lowry* as too vague a criterion of guilt is not well founded. What was there said related to an argument of counsel that "reasonable tendency" should be read into the vague statute under consideration, which had been so construed by the state court as to set at large the objective of the "dangerous tendency" suggested by counsel. At page 256 the court stressed the fact that "The legislation under review differs radically from the espionage acts in that it does not deal with a wilful at-

tempt to obstruct a described and defined activity of the government." In view of the state court's construction of the statute it further said, at page 261:

> "The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense."

Reasonable Tendency Is a Common Law Standard, Not a Newly Created Criterion of Guilt.

More important, however, is the fact that the court was discussing legislation which provided a new measure of guilt and not one which incorporated a recognized common law standard of conduct. The decision differentiates such cases as *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, and *Nash v. U. S.*, 229 U. S. 373, saying:

> "The decisions relied on by the state held the Sherman law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test." (page 263.)

And reliance was placed upon *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, wherein the court, at page 92, said:

> "Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them."

and cited among others, *International Harvester Co. v. Kentucky*, 234 U. S. 216. Mr. Justice Holmes, speaking for the court in that instance said at page 223:

> "We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

The distinction between new statutory tests and settled common law criteria was again drawn by Mr. Chief Justice Taft in *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459. He said:

> "'The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 69 L. ed. 402, 407, 45 Sup. Ct. Rep. 141; Omaechevarria v.

> Idaho, 246 U. S. 343, 348, 62 L. ed. 763, 767, 38 Sup. Ct. Rep. 323, *or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.* Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 223, 58 L. ed. 1288, 34 Sup. Ct. Rep. 853, or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U. S. 81, 92, 65 L. ed. 516, 522, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, "that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." ' "

The reasonable tendency test is the ancient common law standard applicable to contempt of court and, to quote the *International Harvester* case, "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe." The *Herndon* case, dealing with a statutory definition of guilt, does not support petitioner's contention that reasonable tendency to influence the court is not the proper test of unlawfulness of utterances concerning pending causes.[1]

And it should not be forgotten that whatever may be the accepted test of guilt, the existence of a clear and present danger is a question of fact just as is the claim of a reasonable tendency to influence the court. The one test is as flexible as the other and the question always one of fact, as recognized in the concurring opinion in the *Whitney* case.

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[1]See in this connection, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 84 L. Ed. (Adv. Op.) 477, 479-480.

III.

Actual Obstruction of the Court Processes Is Not an Acceptable Test of Contempt.

Judge Bishop found that there was not only an inherent tendency in the Bridges publication "to interfere with, influence, sway and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending" but also that Bridges had, by that publication, "unlawfully interfered with the proceedings of this court." [R. 52.] If actual obstruction were of the essence, this finding of the trier of the facts would conclude the matter.

Counsel for petitioner are mistaken in their assertion that Justices Holmes and Brandeis entertained the views expressed by Mr. Justice Gibson in the *Times-Mirror* case. For the opinion in the *Schenck* case[1] says:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

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[1]249 U. S. at 52.

IV.

Petitioner Has Not Been Denied His Constitutional Right to Petition the Government for a Redress of Grievances.

The Supreme Court of California adequately disposed of this contention in its opinion [R. 160] when it said:

> "Petitioner further contends that the sending and publication of said telegram by him as a labor official to the Secretary of Labor respecting labor matters is protected by the [fol. 150] constitutional guarantee to engage in a lawful occupation. We thoroughly agree with petitioner that the sending of a telegram to the Secretary of Labor was within his constitutional rights, and one might go further and hold that it was within his duties as the executive head of the union affected by the decision of Judge Schmidt to inform the Secretary of Labor of said decision, but he was not charged nor punished for the sending of the telegram. *It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty.*"

Moreover, there is no factual basis for the contention that the telegram to Secretary Perkins was a petition for redress of grievances. The whole of the communication is not in evidence, it was not produced. That fact was adverted to in the oral opinion of the trial judge [R. 44, 46]. The portion received in evidence is quoted at R. 51. It bears no resemblance to a petition to the Federal government, only a threat to the state court. Petitioner Bridges was

not subject to subpoena or compulsory testimony (*Ex parte Gould*, 99 Cal. 360), but, having voluntarily taken the stand in his own behalf [R.108], he was subject to the same inferences as any other party or witness who testifies to but a part of his knowledge of the facts or produces but part of the relevant instruments within his exclusive custody. Bridges' failure to produce the entire telegram raises the inference, and necessitated a finding, that the same was not a petition for redress.[1]

But if it be assumed that the telegram was a petition for redress presented to the Secretary of Labor, that would not establish its innocuousness. Petitioner cites no authority, and we believe there is none, to the effect that one has a constitutional right to petition the executive department for redress against judicial action in a pending cause wherein the prescribed method of redress for error, the process of appeal, has not been exhausted. The constitutional method of petitioning for redress of judicial error is perfecting and prosecution of an appeal. It is only after conviction in a criminal case that the executive can function with respect to a court judgment; and he never has or acquires that right in civil causes.

Manifestly, the Secretary of Labor could have no proper function to perform with respect to the then pending cause of *Walker v. International Longshoremen's Association*, and the publication of the communication to her

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[1]See *Caminetti v. U. S.*, 242 U. S. 470, 492-4; *Raffel v. U. S.*, 271 U. S. 494, 497.

(whatever it may have been) could have had no real purpose other than to communicate Mr. Bridges' views to the trial judge. The historic conception of the right of petition and of the necessity for independent courts does not permit this sort of extraneous control of the judicial process.

Counsel concede "that there are limits to the exercise of this right, as to all rights, constitutional or otherwise." (Pet. p. 19.) And it seems to be established law that, though one may freely petition the legislative or executive branch for redress of wrongs, he nevertheless is responsible by way of libel or otherwise for charges made in such petition.[1] Which merely means that the petitioner is responsible for abuses of the conceded right, just as in the case of free speech or free press.

The contention that a right to petition for redress applies to action in a pending lawsuit was expressly rejected by the Supreme Court of Wisconsin (*In re Stolen*, 193 Wis. 602, 631, 633). The court said in part:

> "The right of petition, natural and inherent though it be, has never, so far as we can discover, been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout many centuries the right of petition has been recognized, but it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While our

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[1]See *Vanarsdale v. Laverty*, 69 Pa. St. 103, 109; *McKee v. U. S.*, 133 Tenn. 455, 460-461.

state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of the adoption of the Constitution. That right shall never be abridged. That right, however, never included the right to attempt to influence the decision of a court through the medium of a petition.
* * *

"Before closing our discussion on this subject, it may be well to refer to the fact that the Constitution guarantees liberty of speech as well as liberty of petition. While there seems to be no recorded case of an attempt to influence the court by petition, there are plenty of cases in which such attempts have been made through the columns of the press. This is generally held to be an abuse rather than an exercise of the right of free speech, and it is well settled that such efforts to influence the course of justice constitute contempt of court. 6 R. C. L. 508 et seq. The right of petition is no more sacred than the right of free speech, and, as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition. Any attempt to influence the courts of justice constitutes an abuse of either right."

V.

The Right of Petitioner to Pursue a Lawful Occupation Has Not Been Denied or Impaired.

The Supreme Court of California adequately disposed of this contention in the language quoted in Point IV from R. 160.

The rights of a labor leader are no higher than those of the newspapers or others relying upon constitutional guaranties. This court denied any superior rights to newspaper publishers in the Associated Press case, from which we have quoted, *supra*. And the California Supreme Court reiterated in *Times-Mirror Co. v. Superior Court*, 99 Cal. Dec. 102, 119 (98 Pac (2d) at 1038) what it had previously said in the *Shuler* case:

> "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of justice in pending causes before judicial tribunals and the judges thereof."

Contempt of court by a labor leader is a contempt of court as much as any other. The exercise of his prerogatives can no more be used to influence the disposition of pending causes than can the "freedom of the press" of the Los Angeles Times.

VI.

Petitioner Has No Right to a Review of the Evidence Herein.

It may be conceded that this court will review the finding of facts of a state court where a federal right has been denied as the result of a finding shown by the record to be without any evidence to support it. But no such federal question is presented here and it cannot be created by mere asseveration. In the *Patterson* case, *supra*, it was "urged that the articles did not constitute a contempt." But the court refused to review that matter saying:

> "However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Supposing that such a case would give the plaintiff in error a standing here, anything short of that is for the state court to decide. *What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.*"

There must be some semblance of substance to the claim of denial of federal right before an examination of the evidence will be made by this court. Even if such an examination were to disclose that the findings of the two state courts are not supported by the evidence, the situation presented would be merely an erroneous application of the state law to the facts. A mistaken interpretation of state law does not raise a federal question.

Before one can be found in the case at bar this court must reverse its decisions in the Colorado and Toledo newspaper cases, impose a new concept of contempt upon the State of California and with respect to the state courts, and then hold that because of the new ruling the Bridges publication could not constitute an abuse of the conceded right of free speech. This it will not do, for such action would recreate and enlarge the ancient prerogative of free speech and *pro tanto* impair the sovereignty of the State of California.

It should also be observed that under the guise of a contention that there is no evidence to support the judgment, counsel for petitioner actually seek a reweighing of the inferences drawn by the two state courts from that evidence [concerning which see R. 43-48, 51-52, 153-160]. That this court will not, even in the face of claim of denial of federal rights, undertake to review conflicting evidence or inferences therefrom and to substitute its judgment for that of the state court, seems well settled.[1]

We submit, without further elaboration, that this court, if it undertook such a reexamination of the facts, would find that the evidence and the reasonable inferences therefrom abundantly support the findings of fact of the trial court, which were approved by the Supreme Court of California.

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[1]See Robertson and Kirkham on Jurisprudence of the Supreme Court of the United States, §90, p. 178, §101, p. 183.

It is submitted that no good ground for certiorari has been shown, and that the writ should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939
No. 759

HARRY BRIDGES,
Petitioner,
vs.
STATE OF CALIFORNIA.

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

EARL WARREN, being duly sworn, deposes and says:

Affiant is the duly elected qualified and acting Attorney General of the State of California, and the person duly appointed by the law of said State to appear for and represent said State as legal counsel in actions and proceedings in which said State is a party. No copy of the Petition for writ of certiorari in the above entitled matter or proceeding, nor any copy of any notice of the filing of said Petition or of any Petition therein, or of any printed record or supporting brief in relation thereto, has been served on said affiant.

EARL WARREN.

Subscribed and sworn to before me this 23rd day of March, 1940.

(Seal) GEO. K. WHITWORTH,
Deputy Clerk, Supreme Court, State of California.

IN THE

Supreme Court of the United States

October Term, 1940

No. 19.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

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Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Statement 1

The narrow issues of the case 1

The nature of the guarantee of free speech 2

I.

Reasonable tendency to influence or interfere with a pending proceeding is the only accepted criterion 8

The danger doctrine is not essentially different from the reasonable tendency rule 18

Petitioner's latest differentiation between danger and tendency 23

II.

As now defined by this court the present danger doctrine is inherently inapplicable to contempt 26

III.

Reasonable tendency to interfere with a pending court proceeding is a long established common law standard which does not lack requisite certainty 30

Cantwell v. Connecticut is not opposed to respondent's position 31

Authorities such as Herndon v. Lowry do not support petitioner's contention 32

Petitioner's misplaced argument as to finality 35

IV.

Actual obstruction of the court proceding is not a constitutionally acceptable test of contempt 39

V.

This proceeding presents no federal question 45

The common law of two hundred years duration cannot be a denial of due process 46

Large implications of recognition of federal question here 48

Writ should be dismissed 49

PAGE

VI.

The sufficiency of the evidence to sustain the conviction is not open to review here 50

VII.

The publication in question was contemptuous according to any suggested standard 55

The clear and present danger to the independence of the Los Angeles Superior Court 56

The factual background of the telegram 60

Summary of evidence 67

Authority of Bridges' publicity agent 72

The preparation of the telegram 74

Petitioner's intent that telegram be published 75

The inherently obstructive quality of the published telegram 81

VIII.

Petitioner has not been denied his constitutional right to petition the government for a redress of grievances 83

The telegram was not a petition for redress 83

The historical connotation of the right to petition for redress of grievances 87

The only permissible petitions affecting pending court causes are those prescribed for use of the parties 89

The telegram is to be measured by the free speech guaranty, not that relating to petitions for redress 93

IX.

The right of petitioner to pursue a lawful occupation has not been denied or impaired 98

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Adams v. Tanner, 244 U. S. 590	100
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389	2, 51
Allen v. Indus. Acc. Com., 3 Cal. (2d) 214	56
American Ry. Exp. Co. v. Kentucky, 273 U. S. 273	2
Anonymous case, 2 Ves. Sen. 520, 28 Eng. Rep. 332	9
Arnold, In re, 204 Cal. 175	93
Associated Press v. National Labor Rel. Bd., 301 U. S. 133	101
Barreiro, Estate of, 125 Cal. App. 752	56
Blythe, In re, 108 Cal. 124	56
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194	56
Bulcke v. Superior Court, 14 Cal. (2d) 510	58
Cantwell v. Connecticut, 2 Atl. (2d) 535 (126 Conn. 1), 310 U. S. 296	4, 31, 54
Charlton's case, 2 My. & Cr. 316, 40 Eng. Rep. 661	11
City of Los Angeles v. Abbott, 217 Cal. 184	56
Cline v. Frink Dairy Co., 274 U. S. 445	30
Converse, Ex parte, 137 U. S. 624	45
Davis v. Beason, 133 U. S. 333	4
Debs, re, 158 U. S. 595	49
Debs v. United States, 249 U. S. 211	20
De Jonge v. Oregon, 299 U. S. 353	86
Dunbar v. New York, 251 U. S. 516	46
Erie R. Co. v. Tompkins, 304 U. S. 64	34, 46
Fox v. Washington, 236 U. S. 273	30
Francis v. People, 11 Fed. (2d) 860 (3rd C. C. A.)	15
Froelich v. United States, 33 Fed. (2d) 660 (8th C. C. A.)	15
Frohwerk v. United States, 249 U. S. 204	20

PAGE

Gay v. Gay, 146 Cal. 237 56
Gitlow v. New York, 268 U. S. 652 ..... 22, 33, 43
Gompers v. Buck's Stove & R. Co., 221 U. S. 419 85
Gould, Ex parte, 99 Cal. 360 74
Grayson v. Harris, 267 U. S. 352 ..... 2, 52

Hague v. Com. for Industrial Organization, 307 U. S. 496 86
Herndon v. Lowry, 301 U. S. 242 ..... 29, 30, 32, 33, 34, 38, 54
Hollenbach v. Schnabel, 101 Cal. 312 56
Hotaling v. Superior Court, 191 Cal. 501 ..... 19, 74
Howat v. Kansas, 258 U. S. 181 85
Huggonson's case, 2 Atk. 469, 26 Eng. Rep. 683 ..... 8, 10, 12

Independent Publishing Co., In re, 240 Fed. 849 ..... 6, 15, 37
International Harvester Co. v. Kentucky, 234 U. S. 216 30

Jackman v. Rosenbaum Co., 260 U. S. 22 47

Meyer v. Nebraska, 262 U. S. 390 100
Minersville School District case, 84 L. Ed., Adv. Op. 4, 5, 25, 29, 34, 47
Minor v. Happersett, 88 U. S. 162 46
Morehead v. New York ex rel. Tipaldo, 298 U. S. 587 2

Nash v. United States, 229 U. S. 373 30
Near v. Minnesota, 283 U. S. 715 ..... 4, 8
Nixon v. State, 207 Ind. 426 29
Norris v. Alabama, 294 U. S. 587 54

Otis v. Superior Court, 148 Cal. 130 49
Ownbey v. Morgan, 256 U. S. 111 47

Palko v. Connecticut, 302 U. S. 325 ..... 3, 86, 70
Patterson v. Colorado, 205 U. S. 460 ..... 2, 8, 10, 13, 26, 35, 49, 54

PAGE

People v. Wilson, 64 Ill. 195 43
Pierce v. United States, 252 U. S. 239 21
Pierre v. Louisiana, 306 U. S. 354 54

Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155 ..... 8, 12
Rex v. Joliffe, 4 T. R. 285, 100 Eng. Rep. 1022 10
Rex v. Tibbits, L. R. 1 K. B. 77 ..... 10, 43
Reynolds v. United States, 98 U. S. 145 ..... 4, 5, 25
Russell v. United States, 86 Fed. (2d) 389 (8th C. C. A.) 85

Schaefer v. United States, 251 U. S. 466 21
Schenck v. United States, 249 U. S. 47 ..... 13, 22, 40
Schneider v. State, 308 U. S. 147 4
Schomer v. R. L. Craig Co., 137 Cal. App. 620 56
Sevier Commission Co. v. Wallowa Natl. Bank, 287 U. S. 575 49
Sewell v. Johnson, 165 Cal. 762 56
Shortridge, In re, 99 Cal. 535 ..... 6, 35, 46
Shuler, In re, 210 Cal. 377 ..... 28, 29, 37, 46, 56, 101
Sinclair v. United States, 279 U. S. 763 ..... 15, 23, 41, 49
Skipworth's case, L. R., 9 Q. B. 230 11
Snowden v. Red River etc. Dist., 284 U. S. 592 49
State v. American News Co., 64 S. D. 385 ..... 12, 29
State v. Bee Publishing Company, 60 Neb. 282, 83 N. W. 206 82
State v. Butterworth, 142 Atl. 57 (N. J.) 86
State v. Owens, 125 Okla. 66 4
State Bank v. Houston Pasture Co., 247 U. S. 240 2
Stolen, In re, 193 Wis. 627 91

Thornhill v. Alabama, 310 U. S. 88 ..... 4, 2, 6, 28, 29
Toledo Newspaper Co. v. United States, 247 U. S. 402 ..... 3, 6, 8, 13, 23, 36, 39, 41, 80, 85
Truax v. Raich, 239 U. S. 33 100

PAGE

Twining v. New Jersey, 211 U. S. 106.....16, 17, 45, 49, 90
Tyler, Matter of, 64 Cal. 434..... 15

United States v. Cohen Grocery Co., 255 U. S. 81..... 30
United States v. Cruickshank, 92 U. S. 542..... 86
United States v. French, 9 Fed. Supp. 30 (D. C. Mich.)..... 85
United States v. Sanders, 290 Fed. 428 (D. C., W. D. Tenn.) 15
United States v. Shipp, 203 U. S. 563..... 85
United States v. Sullens, 36 Fed. (2d)230 (D. C. Miss.)..... 15

Van Dyke v. Superior Court, 24 Ariz. 508..... 37

Wahlenmaier v. Superior Court, 14 Cal. (2d) 799..... 58
Washington etc. Co. v. National L. Rel. Bd., 301 U. S. 142..... 2
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86..... 30
Whitney v. California, 274 U. S. 357..... 23
Wood v. Kennedy, 117 Cal. App. 53..... 56

STATUTES.

California Constitution, Art. I, Sec. 4..... 5
California Constitution, Art. I, Sec. 9..... 5
California Constitution, Art. VI, Sec. 10..... 29
Code of Civil Procedure, Sec. 1209, Subd. 13..... 2

28 United States Code, Annotated, Sec. 385..... 12

TEXTBOOKS AND ENCYCLOPEDIAS.

11 American Jurisprudence, Sec. 325, p. 1120..... 90
12 American Jurisprudence, Sec. 31, p. 413..... 37

1 Bill of Rights, No. 1, p. 74..... 3

28 Columbia Law Review, p. 401, "Contempt by Publication," by Nelles and King..... 14
12 Corpus Juris, Sec. 1100, p. 1287..... 4

PAGE

13 Corpus Juris, Sec. 44, p. 34 15
16 Corpus Juris, Sec. 28, pp. 67-68 30
36 Corpus Juris, Sec. 219, p. 1248 94
16 Corpus Juris Secundum, Sec. 212, pp. 625-7 100
16 Corpus Juris Secundum, Sec. 708b, p. 1492 4
17 Corpus Juris Secundum, Sec. 30, p. 41 15
17 Corpus Juris Secundum, Sec. 30b, p. 44 37
22 Corpus Juris Secundum, Sec. 24a, pp. 70-73 30
Fox on Contempt of Court, p. 1 6
37 Harvard Law Review, p. 1010, "Power of Congress Over Procedure in Criminal Contempts," by Profs. Frankfurter and Landis 4, 14
1 Holdsworth's History of English Law, p. 359 88
1 May on The Constitutional History of England, pp. 349-354 89
Oswald on Contempt of Court, p. 6 11
Oswald on Contempt of Court, p. 93 43
6 Ruling Case Law, Sec. 21, p. 509 15
6 Ruling Case Law, Sec. 25, p. 512 37
6 Ruling Case Law, Sec. 252, p. 267 100
17 Ruling Case Law, Sec. 90, p. 344 94
San Francisco Chronicle, 1 Cal. (2d) 637 ..... 43, 46, 82

IN THE

Supreme Court of the United States

October Term, 1940

No. 19.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

This document is submitted as a supplement to the "Brief for Respondent in Opposition to Petition for Writ of Certiorari" heretofore filed herein, and not as a substitute.

Statement.

The Narrow Issues of the Case.

By the petition, supporting brief and additional brief petitioner has reduced this case to these questions: (1) whether rejection of "clear and present danger" and "actual obstruction" in favor of the "reasonable tendency" criterion is a denial of due process of law or equal protection of the laws; (2) whether petitioner has been denied the right of petition for redress of grievances,

(3) or the right to pursue a lawful occupation, and (4) whether the evidence is sufficient to warrant a holding that the conviction of petitioner was not merely "an arbitrary pretense for an arbitrary punishment" of "innocent conduct" (Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. at 460) or, as elsewhere phrased, "mere arbitrary or capricious exercise of power" (*American Ry. Exp. Co. v. Kentucky*, 273 U. S. at 273).[1]

All other questions, such as the constitutionality of Subd. 13, Sec. 1209, California Code of Civil Procedure, right to jury trial, and argument based upon Sir John Fox's criticism of the procedural phases of *Rex v. Almon*, have been waived. Review upon certiorari is confined to the points raised in the petition.[2]

The Nature of the Guarantee of Free Speech.

Solemn warnings that freedom of speech and of the press must be preserved as a bulwark of our liberties, a defense and an offensive against totalitarianism, do not advance the argument very far. We are still left with the problem of delimiting the bounds of such freedom.

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[1]This court will not review the evidence to determine whether it is sufficient to convict under the reasonable tendency rule or whether Bridges personally caused the publication of excerpts from his telegram. Those are state court questions upon which the findings below are binding (*Grayson v. Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 397). Only in the event of rejection of the reasonable tendency criterion will it become necessary for this court to review the sufficiency of the evidence to determine, as suggested by petitioner (Br. pp. 21, 24, 38), whether the clear and present danger test or the actual obstruction doctrine, if applied to his published utterances, would disclose a legitimate exercise of free speech. This matter is discussed at pages 50-54, *infra*.

[2]*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, e.c. Co. v. National L. Rel. Bd.*, 301 U. S. 142, 146.

Respondent and respondent's counsel[3] are as much interested as petitioner in preserving that freedom in the sense which is "implicit in the concept of ordered liberty";[4] but to preserve that sort of freedom it is necessary to uphold "the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends", for "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."[5]

Petitioner has not embraced Mr. Justice Edmonds' thesis that contempts are immune to punishment merely because they are perpetrated through the columns of a newspaper. He concedes that freedom of the press or freedom of speech is not an absolute right or liberty. Counsel say: "That the courts have the authority and the obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled" (Br. p. 16) and "Interferences with the judiciary admittedly constitute 'substantive evils', which the courts may constitutionally prevent by appropriate measures" (Br. p. 17).

Thus the process of balancing individual liberties against public interests, the obligation to "reconcile the

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[3]"The earliest record of a local bar assocation in the field of civil liberties is that of the Committee on Constitutional Rights of the Los Angeles Bar Association. This committee was organized about ten years ago in 1930" (Bill of Rights Review, Vol. I, No. 1; p. 74).

[4]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. at 325.

[5]*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419.

conflicting claims of liberty and authority"[6] (finding early recognition in *Reynolds v. U. S.*, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, the *Mormon Church* cases, and continuously pursued by this court)[7] is conceded to be necessary in matters of contempt of court as in other governmental affairs.

The conception of independent courts, uninfluenced by extraneous forces, is so deeply rooted in our constitutional system that a specific guaranty has seldom been deemed necessary;[8] but it is fundamental and is recognized as a public necessity which the guaranty of free speech or freedom of the press cannot be permitted to impair.

Counsel supporting petitioners in the *Times* case (No. 64) cite the treatise on "Power of Congress Over Procedure in Criminal Contempts," etc. (*37 Harv. L. Rev.* 1010), by Professors Frankfurter and Landis. The authors say, at page 1020:

> "At the time of the framing of the Constitution a few basic ideas, more or less definite, had clustered around the very notion of a court. Naturally enough, the Supreme Court, as occasion arose, inferred these

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[6]*Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 994 (not yet published in official reports).

[7]See: *Near v. Minnesota*, 283 U. S. 697, 715; *Schneider v. State*, 308 U. S. 147, 160; *Thornhill v. Alabama*, 310 U. S. 88, 96; *Cantwell v. Connecticut*, 310 U. S. 296, 303-4, 310; and lastly, *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 995-6.

[8]It first found expression in Magna Charta, and has been carried into several state constitutions. See 12 *C. J.*, Sec. 1100, p. 1287; 16 *C. J. S.*, Sec. 708b, p. 1492; *State v. Owens*, 125 Okla. 66, 75.

ideas from the term 'Courts' and thereby, for practical purposes, wrote them into the Constitution.

"These limiting conceptions may be thus defined: * * * (2) Independence of judgment must be left to the court in cases where it may decide."

Freedom of speech rests on no higher plane than religious liberty, "an interest inferior to none in the hierarchy of legal values" (*Minersville School District* case, 84 L. Ed. Adv. Op., at p. 996). The court in the *Minersville* case, by reference to the *Reynolds* decision and other cited authorities, showed that the external exercise of religious liberty has always been required to yield to the demands of public authority reasonably exercised. At page 996 the court further said:

> "In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."[9]

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[9]The California Constitution expressly recognizes the proper limitations of all these fundamental liberties. Sec. 9, Art. I, says: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *" And Sec. 4 of Art. I: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; * * * but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

The introduction to Sir John Fox' excursion into the realms of procedural antiquity in contempt matters (*Fox on Contempt of Court*) says this, at page 1: "The punishment of contempt is the basis of all legal procedure * * *."

And the California Supreme Court: "Liberty of the press stops where a further exercise would invade the rights of others. This provision of the Constitution does not authorize a usurpation of the functions of the courts" (*In re Shortridge*, 99 Cal. at 535). The Circuit Court of Appeals for the Ninth Circuit:

> "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. 6 R. C. L. 510, Sec. 22." (*In re Independent Publishing Co.*, 240 Fed. 849, 861.)

And this court, in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419:

> "2. The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.
>
> "We might well pass the proposition by because to state it is to answer it, since it involves in its very

statement the contention that the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

By way of delimiting the bounds of these liberties (freedom of speech and of the press) in their relation to the courts, the common law has long defined as a transgression from exercise to abuse any communication uttered outside a court proceeding under circumstances giving it a reasonable tendency to exercise an influence upon the pending cause over and above that of evidence and argument adduced in open court.

I.

Reasonable Tendency to Influence or Interfere With a Pending Proceeding Is the Only Accepted Criterion.

This test is of indubitable antiquity: it came to us as part of the common law at the formation of the nation. Mr. Chief Justice Hughes, after examining "the historic conception of the liberty of the press", said in *Near v. Minnesota*, 283 U. S. at 715:

> "But it is recognized that punishment for the *abuse*[10] of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

In addition to the *Patterson* and *Toledo* cases this statement was fortified by citation of *Huggonson's Case*, 2 Atk. 469, 26 Eng. Rep. 683; *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155, and numerous early state cases (in footnote 5).

Huggonson's Case (also known as *Roach v. Garvan*) was decided in 1742 and announced the reasonable ten-

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[10]All italics ours, unless otherwise indicated.

dency doctrine. Lord Hardwicke there said, in part (p. 683):

> "Lord Chancellor. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard. (Vide Baker v. Hart, post. 488. Mrs. Farley's case, 2 Ves. 520.)"

At page 685:

> "There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.
>
> "There cannot be anything of greater consequences than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.
>
> * * * * * * *
>
> "There are several other cases of this kind; one strong instance, where there was nothing reflecting upon the court, is the case of Captain Perry, who printed his brief before the cause came on: the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel, but the contempt of this court was prejudicing the world with regard to the merits of the cause before it was heard.
>
> "Upon the whole, there is no doubt but this is a contempt of the court."

The same doctrine was announced and applied in the *Anonymous Case*, reported in 2 Ves. Sen. 520, 28 Eng. Rep. 332, which was decided in 1754, and in *Rex v.*

Jolliffe, 4 T. R. 285, 100 Eng. Rep. 1022, decided in 1791. And this is still the law of England.

Rex v. Tibbits, L. R. (1902), 1 K. B. 77, 85-89, reaffirms Lord Hardwicke's opinion in *Huggonson's Case* and says, in part (p. 88):

> "It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: See Reg. v. Grant. (1) We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these justifies their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity and, indeed, its chief foundation would

> appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence."

In deciding that the fact of actual influence or obstruction is immaterial the court reaffirmed the doctrine of *Charlton's Case*, 2 My. & Cr. 316, 342, 40 Eng. Rep. 661, 671 (1837), and *Skipworth's Case*, L. R., 9 Q. B. 230, 235-238 (1873).

Oswald on "*Contempt of Court*," an English work, says, at page 6:

> "To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation."

And at page 92:

> "Generally, comments on a cause, written and published, spoken or threatened, while it is pending, and prejudicing, or calculated to prejudice, any party, and particularly paragraphs in newspapers having

> that effect are contempts; but speeches or sermons are equally liable to be punished."[11]

At page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."[12]

So much for the English law. The *Respublica* case[13] was decided in 1788; it marked out the pathway which has been constantly followed in the Federal Courts (except as temporarily influenced by the Statute of 1831, which has been codified as 28 U. S. C. A., Sec. 385) and in the courts of the various states.[14] It announced and applied the reasonable tendency test (p. 326 or 159) which was later so ably stated by Mr. Justice Holmes in *Patterson v. Colorado* as follows:

> "In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjuror, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court,*

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[11]The author here cites a long list of English decisions, starting with *Huggonson's Case*.

[12]Citing English cases.

[13]1 Dall. 319, 1 L. Ed. 155.

[14]Except petitioners' case of *State v. American News Co.*, 64 S. D. 385, which is distinctly contrary to the great weight of authority.

and not by any outside influence, whether of private talk or public print.

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."[15]

The doctrine of the *Patterson* case was adopted and applied by the court in *Toledo Newspaper Co. v. United States*,[16] wherein it was said:

"True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily paper having a large circulation, as it was not

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[15]205 U. S. at 462.

[16]247 U. S. at 421. Mr. Justice Holmes, who dissented in this case, did not question this as the common law; he concerned himself with the proper construction of the 1831 statute and its successors and did not bring forth his clear and present danger doctrine until he spoke for the court in *Schenck v. U. S.*, 249 U. S. 47, which was decided at the following term and was not a contempt proceeding.

shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is *controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject.* Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, *but the reasonable tendency of the acts done to influence or bring about the baleful result is the test.* In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, *the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case.* The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."[17]

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[17]Criticisms have been aimed at this opinion in Frankfurter and Landis' "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts", 37 Harv. L. R. 1010, and Nelles and King's "Contempt by Publication", 28 Col. L. R. 401, both of which are cited by petitioners in the *Times* case, No. 64. But these commentaries are concerned with the procedural aspects of the decision. Neither treatise challenges the soundness of the reasonable tendency rule except as the authors conceive it to have been impaired for Federal Court purposes by the Statute of 1831. In fact, Mr. Hanson quotes the Harvard Law Review article as recognizing that "the courts must be 'invested with incidental powers of self-protection'." (Hanson's Br., p. 23; *Times* case, No. 64.)

This language was reiterated and applied in *Sinclair v. U. S.*, 279 U. S. at 763-4,[18] and by the California Supreme Court at bar [R. 157].

And this has been the law of the State of California at all times. There has been no contrary pronouncement. For an early case which voiced this view, see *Matter of Tyler*, 64 Cal. 434, 438.

The Supreme Court said at bar, with respect to the "clear and present danger" and similarly phrased tests:

> "It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were rendered. We are, therefore, content to rest our decision upon the 'reasonable tendency' test in determining whether the publication or act done constituted a contempt of court" [R. 158].

Discussing the claim that the courts have no inherent power to deal with constructive contempt, the court said:

> "On the other hand, he (petitioner) concedes that the rule of law enunciated in our former decisions,

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[18]And see: *United States v. Sanders*, 290 Fed. 428, 432 (D.C. W.D. Tenn.); *United States v. Sullens*, 36 Fed. (2d) 230, 237-8 (D.C. Miss.); *In re Independent Publishing Co.*, 240 Fed. 849 (9th C.C.A.); *Francis v. People*, 11 Fed. (2d) 860, 865 (3rd C.C.A.); *Froelich v. United States*, 33 Fed. (2d) 660, 663 (8th C.C.A.); 6 *R. C. L.*, Sec. 21, p. 509; 13 *C. J.*, Sec. 44, p. 34; 17 *C. J. S.*, Sec. 30, p. 41.

> and reaffirmed so positively and definitely in the San Francisco Chronicle case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court" [R. 148].

And:

> "From the foregoing it will appear that the overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion" [R. 151].

These doctrines were incorporated in the *Times* decision [R. 122, No. 64].

Petitioner should be able to advance some overwhelming reason as a basis for urging this court to reverse itself and then impose his new concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, he should be able to furnish an affirmative answer to the query whether his "present danger" doctrine "is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106.)

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and

present danger has never found its way into the law of contempt.

Though garbed in generalities and bedecked with felicitous phrases garnered from opinions of this court dealing with dissimilar situations, petitioner's argument for rejection of the reasonable or inherent tendency doctrine, stripped of ornamentation, appears to be the same as that of counsel for the Times-Mirror Co., namely, that the clear and present danger doctrine *should be* now incorporated into the contempt law because, so counsel assert, reasonable tendency (which has been found a workable standard in England and the United States for the past two hundred years) is too vague to comply with the requirements of due process, whereas "clear and present danger" possesses all of the necessary elements of certainty.

> "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." (Railroad Com. v. Rowan & Nichols Oil Co., 84 L. Ed. (Adv. Op.) at 985.)
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> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." (*Twining v. New Jersey*, 211 U. S. at 106-7.)

The Danger Doctrine Is Not Essentially Different From the Reasonable Tendency Rule.

We showed in our former brief that the doctrines are essentially one (pp. 19-26); that the protagonists of the proffered standard cannot define it in terms of contempt so as to exclude the tendency concept (p. 20); and that each test presents in its application a question of fact depending for solution upon determining a matter of degree (pp. 21-23)—degree of tendency to interfere or of danger of interference.

The later brief of petitioner reflects the same difficulty. Inveighing against the accepted standard counsel term it variously as "dangerous tendency" (Br. p. 9), "dangerous and inherent tendency" (Br. p. 10) and, indeed, they indicate that they were unable to show the California Supreme Court any difference, for in the footnote to Brief page 15 they say: "The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the 'inherent and dangerous tendency' rule [R. 158]."

Counsel in the *Times* case say, of the application of clear and present danger to contempt, that "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected" (p. 16). It has been repeatedly held that a publication tending to influence a pending proceeding is an interference with it. We apprehend that what they mean is that the tendency to interfere should be so "immediate and serious" that success in influencing the proceeding "was to be expected". In other words, as they now define it, their rule merely calls for a clearer case of tendency—for a difference in degree.

But when it is remembered that a conviction can be had only upon evidence convincing the trial judge beyond reasonable doubt [R. 47; *Hotaling v. Superior Court*, 191 Cal. 501, 505] of the obstructive quality of the publication, this difference in degree of danger hardly suffices to upset the common law of centuries past or to impel a declaration by this court that its application to petitioner is a denial of due process.

And speaking of these questions of degree, what in the last analysis is the difference between a *present danger* of publications working "interferences and outside influences concerning pending cases" (Br. p. 16) and an *inherent tendency* of such publications to bring about such "interferences and outside influences"?

An analysis of the decisions discloses that the authors of the danger rule conceived no difference between it and reasonable tendency; that there was immanent in their exposition of the doctrine a recognition of the fact that a reasonable or inherent tendency to accomplish a harmful result presents a present danger thereof.

When the doctrine was first announced by Mr. Justice Holmes in the *Schenck* case,[19] he and the rest of the court held that the standard had been met by a document which would reasonably be expected to influence persons subject to the draft. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be *expected to have* upon persons subject to the draft *except to influence them* to obstruct the carrying of it out" (p. 51). This was in response to this contention:

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[19]249 U. S. 52.

"But it is said, suppose that that was the *tendency* of this circular, it is protected by the 1st Amendment to the Constitution" (p. 51). Explaining that "It is a question of proximity and degree", the learned jurist found that the tendency of the document was enough to meet the danger test and in that connection specifically rejected the actual obstruction criterion (p. 52).

In *Frohwerk v. United States*, 249 U. S. 204, an espionage case dealing with newspaper publishers, Mr. Justice Holmes again applied the danger doctrine, saying at page 209:

> "But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame, and that the fact was known and relied upon by those who sent the paper out;"

and held the tendency in the particular circumstances to be enough.

Debs v. United States, 249 U. S. 211, held that the present danger standard had been met, Mr. Justice Holmes saying in part at page 216:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words *tending to obstruct* the recruiting service, he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words

> used had as their *natural tendency and reasonably probable effect* to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind."

In *Schaefer v. United States*, 251 U. S. 466, another newspaper espionage publication case, the court, speaking through Mr. Justice McKenna, referred to the *Schenck* case as affording the proper criterion of guilt and, concerning its application to the publications in question, said at page 479:

> "Their effect on the persons affected could not be shown, nor was it necessary. The *tendency of the articles* and their efficacy were enough for offense—their 'intent' and 'attempt', for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

In *Pierce v. United States*, 252 U. S. 239, plaintiff in error contended that "there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act" (p. 243). Concerning the pleadings the court, through Mr. Justice Pitney, said:

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer" (p. 244).

And:

> "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have *a tendency to cause* insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged" (p. 249).

Gitlow v. New York, 268 U. S. 652, says at page 667:

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, *tending* to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

And at page 671, citing the *Schenck* case as authority for the rule, said:

> "In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent."

Incidentally this case, like the *Schenck* rejected the "actual obstruction" contention. "There was no evidence of any effect resulting from the publication and circulation of the Manifesto" (p. 656).

> "And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger

from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration" (p. 669).

Dissenting in *Whitney v. California*, 274 U. S. 357, Mr. Justice Brandeis said at page 376:

> "To justify suppression of free speech there must be *reasonable ground to fear* that serious evil will result if free speech is practiced. There must be *reasonable ground to believe* that the danger apprehended is imminent."

None of the later cases throws any doubt upon the substantial identity of the reasonable tendency and the present danger tests.

Petitioner's Latest Differentiation Between Danger and Tendency.

Petitioner now suggests a superior virtue in the danger doctrine because, so counsel say, reasonable tendency has no "objective criteria" (Br. p. 6). Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness. The view finds no support in the authorities. The *Toledo* and *Sinclair* cases say:

> "But the situation is controlled by the reasonable tendencies of the acts done, and not by extreme and

substantially impossible assumptions on the subject." (247 U. S. at 421, and 279 U. S. at 764.)

Quite obviously the rule does not permit of any presumed or esoteric tendency, such as petitioner suggests.

Counsel invoke in support of this position the Virginia Statute on Religious Liberty (drafted by Thomas Jefferson) and certain passages from Schroeder on Constitutional Free Speech, which quotes statements from St. Hilary in 335 to Tunis Wortman in 1800. But these expressions do not support the contention. They relate in the main to religious liberty, deal with "*mere* expression of opinion" (Br. p. 6), and do not contend for an absolute right.

The Virginia Statute, in its reference to "their ill tendency", is concerned with the quality *per se* of religious opinions or utterances, not with the circumstances of expression. Jefferson's "Notes on the State of Virginia", quoted by Shroeder, emphasize this:

> "The legitimate powers of government extend to *such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.*"[20] (Italics by author.)

John Wickliffe in 1729, contending for religious liberty, said:

> "The Protestant Succession was established among us by the good Providence of God, for the Protection of our Religions and Civil Rights and Liberties. *Religious Liberty, or Liberty with regard to Religion, seems to consist in nothing else but thinking about Religion in what way we judge proper, and the openly*

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[20]Schroeder's Constitutional Free Speech, p. 438.

> *avowing and expressing such Thoughts,* and worshipping God, as we judge proper. And it is a Right which every Man ought to enjoy, (and which therefore the Protestant Succession was design'd to protect) to exercise this Liberty in all Instances *not hurtful* to anybody else. Civil Liberty is a Liberty to do what we judge proper: This therefore is likewise our Right, with the same Restriction as before, that we *don't hurt* anybody else by it. * * *."[21] (Italics by author.)

This matter is made clear in *Reynolds v. United States*, 98 U. S. 145. It was there conceded that one has an absolute privilege to believe in plural marriage if he likes, but held that the practice of polygamy (the external manifestation of the belief) must yield to "the felt necessity of society".[22] The court in the *Reynolds* case, speaking of the First Amendment, said at page 164: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order", for to permit more than this "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself" (p. 167).

We cannot escape the basic rule that there are no absolute rights or liberties. And the treatises just discussed do not impinge upon the settled doctrine that utterances which have an inherent tendency to interfere with pending judicial proceedings are excesses and hence outside the aegis of free speech.

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[21]*Id.*, p. 410.

[22]Quoting *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) at 995.

II.

As Now Defined by This Court the Present Danger Doctrine Is Inherently Inapplicable to Contempt.

If there be any discernible and substantial difference between the two doctrines—tendency to influence and danger of influence—it becomes apparent that the latter rule is not susceptible of application to contempt; that its field for operation is political and economic discussion.

The *rationale* of the *Thornhill* decision[23] forbids application of this standard to contempt of court (even if the proper criterion were not wholly within the exclusive area of state control). The opinion carefully limits the scope of free speech and freedom of the press to the fields of political and economic discussion and shows that historically and *ex necessitate* free discussion up to the danger point cannot apply to pending litigation,—this for the basic reason previously stated by Mr. Justice Holmes:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."[24]

Mr. Justice Murphy said at page 95 of the *Thornhill* decision:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields

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[23]310 U. S. 88.

[24]*Patterson v. Colorado*, 205 U. S. at 462.

> may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Clearly the correction of error in court proceedings is the province of the appellate tribunals, not the newspaper, the labor leader, the radio orator or the mob,—not any of the other "processes of popular government".

The real object of this freedom, as stated by the Continental Congress, is set forth at page 102 as follows:

> "The importance of this consists, besides the advancement of truth, science, morality, and arts in general in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

Can it be that this was intended to refer to the courts? That their deliberations are to be "shamed or intimidated, into more honourable and just modes of conducting affairs"? Petitioner has not had the temerity to embrace that doctrine. Judge Wilson thus stated the obvious truths:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbid-

> den ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves." [R. 104, No. 64.]

The *Thornhill* opinion further says at page 102:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Is this not satisfied, as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect? It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to pending matters (see ruling as to Count One of the *Shuler* case, 210 Cal. at 387, and authorities cited at page 37, *infra*); and that the court found at bar that the wrong consisted in influencing not past matters but the ensuing decision which the trial judge was about to make upon the motion for new trial and kindred motions.

Mr. Justice Murphy said in the *Thornhill* opinion (p. 104):

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances of affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Never in our history until Mr. Justice Edmonds and Mr. Justice Gibson suggested it has it been thought that judicial deliberation must abide (or be subject to) the test of its merits "by competition for acceptance in the market of public opinion."[25]

Referring to such cases as *Thornhill, Herndon, Hague* and *Schneider* (and naming part of them), Mr. Justice Frankfurter said in the *Minersville School District* case (Footnote 6 on p. 998): "the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function",—thus clearly differentiating them from contempt proceedings. For the processes of popular rule were never intended to "effectively function" through direct application to judicial deliberations of a judge concerned with a pending matter. They—the processes of popular rule—are given full scope through the indubitable right to criticize any closed matter; to join as friends of the court (*e. g.*, American Civil Liberties Union and American Newspaper Publishers Association at bar) in seeking a reversal; to recall the judge; to refuse to re-elect him; to bring about his impeachment or his removal from office by legislative action (see Cal. Const., Art. VI, Sec. 10).

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[25]Neither *State v. American-News Co.*, 64 S. D. 385, nor *Nixon v. State*, 207 Ind. 426, goes so far. The *Nixon* case related to a past matter, like count one of the *Shuler* case, 210 Cal. at 387, and the court did not reject the tendency doctrine. The *American-News Co.* case exhibits judicial palsy in the face of the power of the press. The court exonerated the defendants although it said at page 400: "The defendants by their series of publications attempted to arrogate unto themselves the administration of justice in regard to all these cases. It is unfortunate for any community when this occurs." But more unfortunate for the State of South Dakota when its Supreme Court exhibited so little courage as to exonerate the defendants from the clearly established charge of contempt with the confession that "very possibly we do" err.

III.

Reasonable Tendency to Interfere With a Pending Court Proceeding Is a Long Established Common Law Standard Which Does Not Lack Requisite Certainty.

We have, in discussing *Herndon v. Lowry*[26] in our former brief (pp. 23-26), pointed out the basic difference between a new and vague statutory measure of guilt, one not confined to "a described and defined activity of the Government", on the one hand, and a well settled common law standard "notwithstanding an element of degree in the definition as to which estimates might differ", on the other hand. To the effect that this is a well settled distinction see also 16 *C. J.*, Sec. 28, pp. 67-68; 22 *C. J. S.*, Sec. 24a, pp. 70-73. We also have shown the antiquity and uniformity of the reasonable tendency test. Its successful administration for some two hundred years or more renders presently applicable the remark of Mr. Justice Holmes, who said in *International Harvester Co. v. Kentucky*, 234 U. S. 216, at 223:

> "The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

Counsel for petitioner profess to be content to abide by "the conventional concept of 'due process of law' in all criminal prosecutions" (Br. p. 8), and the authorities cited at pages 24-26 of our former brief[27] relate in each

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[26]301 U. S. 242.

[27]*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Nash v. U. S.*, 229 U. S. 373; *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 92; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459; *Fox v. Washington*, 236 U. S. 273.

instance to a criminal or *quasi* criminal proceeding and hold a common law standard not unconstitutional "merely because it throws upon men the risk of rightly estimating a matter of degree" where "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe".

But opposing counsel make no attempt to differentiate these cases. They are merely ignored. This will scarcely suffice to read them out of the books, especially when considered in the light of the authorities cited at pages 46-48, *infra*.

Though counsel in this case do not so contend, it may be thought, and counsel for the *Los Angeles Times* obliquely suggest, that the *Cantwell* case is opposed to these authorities.

Cantwell v. Connecticut Is Not Opposed to Respondent's Position.

The *Cantwell* decision[28] is not at variance with the cases cited in our opening brief. The fifth count, under which petitioner Jesse Cantwell was convicted, charged, as shown by the report in 8 Atl. (2d) 535 (126 Conn. 1), that petitioner "did disturb the public tranquillity by certain acts or conduct inciting to violence or tending to provoke or excite others * * * to break the peace"; and the state court held that "The fifth count charges a breach of the peace by acts which are within the common-law definition of that offense" (p. 536); but this tribunal held the contrary, saying at page 309:

> "One may, however, be guilty of the offense if he commit acts or make statements *likely to provoke*

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[28]310 U. S. 296.

> violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. * * *.
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> "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

And hence the court further concluded that petitioner had been convicted "on a common law concept of the most general and undefined nature" (p. 308), a mistaken concept. The opinion impliedly concedes that the common law offense of breach of the peace, correctly understood and applied, would be a sufficiently definite standard of guilt.

Authorities Such as *Herndon v. Lowry* Do Not Support Petitioner's Contention.

We have discussed that case[29] at pages 23-26 of our former brief, but counsel supporting petitioner lay so much stress upon it that it seems necessary to more clearly indicate its proper place in the jurisprudence of free speech.

None of the cases so far decided rejects "reasonable tendency" to accomplish a harmful result where that test

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[29]301 U. S. 242.

has been prescribed by the legislature. Cases which seem to reject it in the field of political and economic affairs do so only as counsel attempt to engraft that criterion upon otherwise vague standards not permitting of that construction. As we pointed out in our former brief, that is manifestly true of the *Herndon* decision. That opinion *ex industria* makes it clear that the court was not dealing with a canon of conduct expressed with reasonable certainty and reflecting a legislative determination that such conduct is harmful because of its dangerous tendency. At page 260 it is said:

> "It is to be borne in mind that the legislature of Georgia has not made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare."

This was by way of emphasis of what had previously been said concerning the *Gitlow* case:

> "It relies particularly upon Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625. There, however, we dealt with a statute which, quite unlike §56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described": (p. 256)

and, quoting that case:

> "'* * * when the legislative body had determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and

> of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." (p. 257.)

The trouble with the Georgia Statute was that it neither reflected a common law standard nor any other rule of action sufficiently definite to serve as a standard. But the inference is irresistible that had the legislature written into the statute some common law criterion, it would have been upheld.

The contempt rule of reasonable tendency which came to us as a part of our basic jurisprudence stands on a parity with the legislative declaration of a standard of misconduct. In effect the rule declares that the proscribed utterances, because of their tendency "to obstruct a described and defined activity of the government" (*Herndon*, p. 256)—the functioning of the courts—present a present danger of a "substantive evil which the state constitutionally may seek to prevent", one "within the allowable area of state control". Like the *Herndon* case, the *Minersville School District* decision draws attention to the higher authority of rules of conduct which constitute "manifestations of specific powers of government deemed by the legislature essential to secure and maintain * * * orderly, tranquil, and free society * * *."[30] The *Erie Railroad* case (304 U. S. 64) establishes that it makes no difference whether the state has spoken through its legislature or its common law, if it has spoken with sufficient certainty.

A survey of the rulings of this court will show that the danger doctrine has not operated in any single instance to

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[30]84 L. Ed. (Adv. Op.) at 996.

strike down a reasonable tendency standard prescribed by the legislature. In none of the cases where it was declared or applied was any statutory (or any common law) standard of reasonable tendency involved.

Petitioner's Misplaced Argument as to Finality.

Petitioner further attacks the reasonable tendency rule upon the ground that it defers all discussion of court proceedings until complete finality in the court of last resort, and that, therefore, this rule which came to us with our national freedom "strikes a foul, if not fatal, blow at the democratic, the American, way of life" (Br. p. 14).

The argument overlooks the authoritative ruling of this court that the duration of the pendency of an action for contempt purposes is exclusively a question of state law (*Patterson v. Colorado*, 205 U. S. at 460) and no longer open to discussion. But petitioner's criticism would possess no substance if the matter were to be now reexamined on its merits.

To begin with, the rule has no relation to substantially true news accounts published at any stage of the proceeding,[31] news accounts as distinguished from discussion of the merits. In the second place, the desire to publish comment or criticism or protest does not prove or create the right to do so. The critic or publisher must await finality of the particular matter because he is obligated to refrain from injecting extraneous influences into the judicial deliberations. Neither he nor his hearer or reader is entitled to debate with the judge the merits of a matter *sub judice*.

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[31] *In re Shortridge*, 99 Cal. 526.

The argument is that litigation of public interest such as the *Mooney* case, causes involving the validity of child labor legislation, social security enactments, wage and hour laws and the like, should be open to discussion at all stages and in all places and inferentially through all types of publications. The contention overlooks the true scope of the reasonable or inherent tendency doctrine which is confined to "the reasonable tendencies of the acts done" and does not embrace "extreme and substantially impossible assumptions on the subject".[32]

Mr. Bridges may talk with Secretary Perkins all he wants about the injustice of a court decision or the proper outcome of a pending matter, but he cannot do it in the presence of the judge, nor can he send the judge a transcript of the conversation. He may issue all the circular letters to union members which seem to him proper and, if they fortuitously come to the attention of the judge, it may be that there is a causal break which absolves him from responsibility. He may hold all the union meetings which he likes and there discuss the pending litigation, but he cannot hold those meetings on the courthouse steps or in the courtroom itself, nor can he place an account of that meeting in channels which will normally and inevitably lead it into the judge's chambers.

Just as Mr. Bridges' conferences with union leaders or members lack enough kinetic energy to carry into the council chambers of the court, so does a Los Angeles newspaper, through its localized circulation, lack potentiality to interfere with the deliberations of the Supreme Court of the United States when the *Mooney* or the *Herndon* or the *Muller* or some similar case is before it,—regardless of whether it carries a message from Mr. Bridges. And

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[32] *Toledo Newspaper* case, 247 U. S. at 421.

while an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article appearing in an inconspicuous country newspaper would not have had the requisite reasonable tendency to disrupt the judicial calm of the Supreme Court of California, nor would it when appearing in the San Francisco Chronicle have sufficient momentum to reach the attention of the Justices of this high court.

Petitioner's argument is on a parity with that of the *Times-Mirror* counsel who say that finality of a murder conviction occurs only with defendant's execution because forsooth a writ *coram nobis* may lie. Such extreme arguments defeat their own purpose.

Finality is requisite, but it is finality of the matter under discussion.[33] So held as to the first count of the *Shuler* case in 210 Cal. at 387.[34] But it was likewise there held that the finality of that first phase of the cause did not warrant the discussions mentioned in the second and third counts and which related to approaching judicial action on other phases of the case. So at bar, petitioner was not convicted because of the relation of his published telegram to any concluded phase of the Walker litigation; it was because of the potential, "the inevitable", influence upon phases of the case which were still pending and which would require early action by the judge. [R. 46, 52, 155-56, 160.]

Reasonable tendency is a realistic test. It applies to publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial cham-

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[33]See: 6 *R. C. L.*, Sec. 25, p. 512; 17 *C. J. S.*, Sec. 30b, p. 44; 12 *Am. Jur.*, Sec. 31, p. 413; *In re Independent Publishing Co.*, 240 Fed. 849, 853-4 (9th C.C.A.).

[34]*Cf. Van Dyke v. Super. Ct.*, 24 Ariz. 508, 541.

bers. Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the nature and place of the utterance and its inherent momentum.

So the arguments about the *Mooney, Herndon, Muller, Powell, Norris* and *Thornhill* cases are misplaced and tend only to reflect a distorted viewpoint of petitioner.

No more potent is the claim that assumed necessity to finance impecunious but misjudged defendants connotes a right to discuss the merits in such manner as to tend to disrupt the functioning of the court wherein the cause is pending. When the matter is before the Superior Court, strangers to the litigation must let it alone; when before the District Court of Appeal or the state Supreme Court, that tribunal must not be disurbed by extraneous influences; but judges of the Superior Court, after the matter has passed to the appellate tribunal, being through with the matter, can be persuaded concerning the merits, solicited for funds to finance an appeal or otherwise addressed concerning it. And so when the California Supreme Court is done with the case, it may be heartily criticized or even libeled without answerability for contempt, but such "protests" of error cannot be lawfully mailed to the Justices of this court while the cause is here pending, nor may interested parties waylay them in the corridors or on the street to discuss the merits or to solicit funds for presentation of the matter to the court.

Reasonable tendency has a fixed meaning which, as we have shown, excludes "extreme and substantially impossible assumptions on the subject". Like clear and present danger, its application presents a question of proximity and degree. And nothing is accomplished by arguing from one factual situation to another possessing a different degree of tendency or danger.

IV.

Actual Obstruction of the Court Proceeding Is Not a Constitutionally Acceptable Test of Contempt.

Judge Bishop found that there was not only an inherent tendency in the Bridges publication "to interfere with, influence, sway and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending," but also that Bridges had, by that publication, "unlawfully interfered with the proceedings of this court." [R. 52.] If actual obstruction were of the essence, this finding of the trier of the facts would conclude the matter.

The actual obstruction principle, as advanced in petitioner's brief, connotes a communication actually exercising an influence upon the court. In this sense it may be said that Mr. Justice Holmes contended for "actual obstruction" in his dissent in the *Toledo Newspaper Company* case, but *only* as applied to the construction of the statute under consideration. For the learned justice cautioned that, "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the power of the courts" (247 U. S. p. 424). He was discussing an act which said that the contempt power of courts should "not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." He thought the language of the statute "too plain to be construed away" and that the phrase "so near as to obstruct" meant "so near as actually to obstruct—and not merely near enough to threaten a possible obstruction." But the majority of the court differed with him and held that the publication

in the neighborhood of the court of articles *having a reasonable tendency to influence* the deliberations of the judge *constituted an actual obstruction* of the administration of justice; that "the test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (p. 419). Again, at page 421:

> "But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong [illegible] upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

That the learned justice abandoned the viewpoint of his dissent appears from his discussion of the clear and present danger doctrine in the *Schenck* case,[35] where he said:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are

[35]249 U. S. at 52.

the same, we perceive no ground for saying that success alone warrants making the act a crime."

But more potent evidence of the fact that Mr. Justice Holmes ultimately accepted the rationale of the *Toledo* decision is found in his concurrence in *Sinclair v. United States*, 279 U. S. 749, the jury shadowing case. The appellant Sinclair relied upon the same construction of the federal statute which Mr. Justice Holmes had advanced in the *Toledo* case:

"They challenged the sufficiency of the petition to charge anything done in the presence of the court, or near thereto, which obstructed or impeded due administration of justice, or tended so to do." (p. 753.)

"Counsel maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within Sec. 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation." (p. 762.)

The court's opinion conceded that:

"The evidence does not disclose that any operative was instructed to approach, or did approach, a juror, nor does it disclose that any juror actually knew that he was being shadowed. Some were suspicious. The court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed," (p. 758)

but definitely rejected the obstruction principle, saying, at page 762:

> "The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation."

The portion of the Toledo decision expounding the reasonable tendency doctrine was then quoted with approval, and the court further said, at page 764:

> "Under the doctrine so stated, we think the trial judge rightly held it unnecessary to allege or show actual contact between an operative of the detective agency and a juror, or that any juror had knowledge of being observed. The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

and

> "The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly, they were not less remote than the publication denounced in Toledo Newspaper Co. v. United

> States. There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was towards evil, the destruction, indeed, of trial by jury." (p. 765.)

Here is a clear rejection of the actual obstruction principle, and Mr. Justice Holmes and Mr. Justice Brandeis, who had dissented in the *Toledo* case, joined in the ruling.

Gitlow v. New York, 268 U. S. 652, 669 is likewise directly in point; see quotation at pages 22-23, *supra*.

That this is the English rule of long standing appears from *Rex v. Tibbits* and other cases, cited at pages 10-11, *supra*. *Oswald on Contempt of Court*, citing English cases, says at page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The California Supreme Court in *In re San Francisco Chronicle*, 1 Cal. (2d) at 637, quoted with approval from *People v. Wilson*, 64 Ill. 195, as follows:

> "'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental

poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Exen if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.'"

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108 of No. 64:

> "If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132 of *Times* case.

V.

This Proceeding Presents No Federal Question.

The matter is discussed at pages 2-12 of our former brief.

It is there shown that the definition of lawful or unlawful conduct, the erection and maintenance of independent courts, are within the exclusive keeping of the states,[36] pertaining to their internal sovereignty—subject only to the requirements of due process and equal protection of the laws.

Twining v. New Jersey, 211 U. S. 78, 106:

> "In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in Hurtado v. California, 110 U. S. 516, 527, 28 L. Ed. 232, 235, 4 Sup. Ct. Rep. 111, 292."

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[36] See, also, *Ex parte Converse*, 137 U. S. 624, 631-2.

That due process in the procedural sense was afforded petitioners is amply disclosed by the facts and authorities reviewed at pages 6-10 of that brief.

That there was uniform application of the law appears from comparison of this case with the *Times* proceeding, as well as the *Chronicle*, *Shuler*, *Shortridge* and other cases cited by the Supreme Court. [See R. 147, 156, and R. 122, No. 64.]

The Common Law of Two Hundred Years Duration Cannot Be a Denial of Due Process.

But counsel would erect a constitutional question out of asserted error in the rule which has prevailed for two hundred years, forgetting that "no constitutional rights can be based on the error of prior decisions;"[37] also forgetting that the fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[38] Indeed, the very antiquity of the reasonable tendency rule establishes its harmony with due process.

What Mr. Justice Frankfurter said about legislation and religious liberty is equally applicable here:

> "Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant.[39] * * * * Nor does the freedom of speech assured

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[37] *Dunbar v. New York*, 251 U. S. 516, 519.

[38] *Minor v. Happersett*, 88 U. S. 162, 171.

[39] It is immaterial, of course, whether the state has spoken through its legislature or its courts defining the common law. See quotations from *Erie R. Co. v. Tompkins*, 304 U. S. 64, at pages 4-5 of respondent's initial brief herein.

by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."

Minersville School Dist. v. Gobitis, 84 L. Ed. (Adv. Op.) at 995-6.

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,[40] referred to the fact "that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn, and has prevailed in the state ever since" (p. 30), and held:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ozanbey v. Morgan, 256 U. S. 94, 104, 112, 65 L. Ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433." (p. 31.)

The cited case of *Ozanbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:[41]

"A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law. * * *

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy.

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[40] *Jackman v. Rosenbaum Co.*, 260 U. S. 22.

[41] 256 U. S. at 111-12.

> Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Nor does the Fourteenth Amendment contain any mandate for the rejection of a time-honored criterion of contempt and substitution of a new and putatively better one.

Large Implications of Recognition of Federal Question Here.

The result of a holding that the case presents a federal question would be fraught with large consequences. We assert that the determination of the rules necessary to preserve the independence of the California state courts is solely within state competency; that no supervisory power rests in any branch of the federal government; and that substitution of a new rule for the state courts would constitute a serious impairment of the autonomy of the state; "whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government,

and changes its relation to its people and to the Union" (*Twining v. New Jersey*, 211 U. S. at 92).

The California Supreme Court has declared that "every court is the exclusive judge of its own contempts" (*Otis v. Superior Court*, 148 Cal. at 130), and this court that "this is no technical rule," for "to submit the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency" (*Re Debs*, 158 U. S. at 595).

If the rule of the *Patterson, Toledo, Sinclair* and similar cases is now to be abandoned, if the cogency of the evidence supporting state convictions is to be here reviewed —three thousand miles from the place of the contempt— then, indeed, are the state courts rendered impotent. Few courts have the aid of Bar Associations willing or financially able to sustain the burden of supporting for two or three years, and to the highest court in the land, its judgments. If contempt is held a federal question and the evidence reviewable, any litigious contemner will be able to frustrate the local courts; their hands will be stayed by the ever-present threat of federal review and lack of ability to pursue the matter. The truth of this assertion would be even more apparent if this court were to find itself unable or unwilling to take judicial cognizance of the local situation reviewed at pages 56-59, 81-82, *infra*.

Writ Should Be Dismissed.

We respectfully submit that the instant writ should be dismissed as one improvidently granted in the absence of a substantial federal question.[42]

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[42] *Snowden v. Red River etc. Dist.*, 284 U. S. 592; *Sevier Commission Co. v. Wallowa Natl. Bank*, 287 U. S. 575.

VI.

The Sufficiency of the Evidence to Sustain the Conviction Is Not Open to Review Here.

The admission made concerning this matter at page 33 of our former brief is too broad.

This court, following sound precedents, will refuse to review the evidence in the instant case, subject only to the exception that, in event of rejecting the reasonable tendency criterion and substituting "present danger" or "actual obstruction," it would be called upon, as suggested by petitioner's arguments, to determine whether the evidence meets either of those standards; if petitioner is guilty according to the standard he has invoked, his conviction cannot possibly have resulted in a denial of due process or equal protection of the laws.

But if this court holds the reasonable tendency test to be consonant with constitutional requirements, that ends the case; the sufficiency of the evidence then becomes strictly a state question—a preliminary or conditional fact which is not bound up in the federal question of what criterion the Constitution demands. The federal question arises, if at all, upon the legal controversy as to the requisite standard of contempt, not upon the distinctly separate question of fact as to whether that standard has been met.

The rule that this court will review the evidence to determine for itself the existence of a federal question is limited to cases of necessity.

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, was an action upon a policy of life insurance, which resulted in favor of plaintiff. Upon writ of error the insurance company claimed that the undisputed evidence established that the policy had never become a completed or binding contract; it also raised the question of whether the same was governed by the laws of Tennessee, Connecticut or Texas. This question of conflict of laws was held to be federal. Concerning the matter of insufficiency of the evidence, the court said, at page 394:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. * * * To this general rule there are two equally well-settled exceptions: '(1) Where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.' * * * This case comes within the general rule, and not within either of the exceptions. The fact decided is that the policy sued upon was delivered as a completed and binding contract. The federal question presented arises from the ruling of the court that the Texas, and not the Tennessee, statute controls this contract. The asserted federal right was not denied as a result of the finding of fact; nor are the conclusions in respect of the federal right and the finding interdependent, or so intermingled as to cause it to be necessary to consider the

> latter in order to pass upon the former. That the contract was effective is a fact equally consistent with the determination of the federal question either way."

This is obviously true of the finding that Bridges caused the telegram to be published.

And the fact that its publication had a certain tendency is likewise an independent fact which is equally consistent with determination of the federal question either way. If the tendency test is upheld the factual finding supports the judgment; if tendency is rejected the finding of fact falls with it, swept aside as an inconsequential incident of a void judgment. (The *finding* of reasonable tendency is swept away, but the evidence remains as a basis for further inquiry into the dangerous or obstructive quality of the editorials.)

Grayson v. Harris, 267 U. S. 352, was an action to determine title to certain lands in which plaintiffs' rights depended upon proof that they were citizens of the Creek Nation. It was claimed that this court should "review the record in that respect in order to determine whether there was any basis for the claim of federal right" (p. 357); but the court said:

> "The point that the evidence fails to show that plaintiffs in error were Creek citizens presents a pure question of fact. The trial court found they were. The state Supreme Court expressly affirmed the finding and, recognizing the existence of the federal question in the case, put its decision denying

the federal right upon an erroneous view of the law. The denial was not the result of the finding of fact, nor is that finding so intermingled with the conclusion of law in respect of the federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the federal question. * * * The effect of the finding was to establish the existence of a preliminary fact, related to the federal right only in the sense that it brought the case within the reach of the federal law relied on, and called for a determination of the federal question then presented. In other words, the finding simply established a condition, not as a basis upon which to rest a decision of the question of federal rights one way or the other, but upon which that question became an issue for consideration and determination. In such case, the ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here." (pp. 357-358.)

This language seems fully applicable here. The fact of Bridges' personal responsibility for the publication is on an exact parity with the finding of plaintiffs' membership in the Creek Nation. And the *fact* of the unlawful tendency of the publications relates to the federal right (the proper standard) only in the sense that it "brought the case within the reach of the federal law relied on, and called for a determination of the federal question then presented". If due process has been denied petitioner, it is because of failure to apply the proper legal standard

to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence.

Nor do we have a case where the factual finding is "so intermingled with the conclusion of law in respect of the federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the federal question". The cases of *Herndon v. Lowry*[43] and *Cantwell v. Connecticut*[44] fall within this latter category and, hence, are clearly distinguishable from the matter at bar. Those cases are cited by petitioners in the *Times* case. Counsel at bar rely upon *Norris v. Alabama*, 294 U. S. 587, and *Pierre v. Louisiana*, 306 U. S. 354.

The *Norris* ruling was expressly placed on this ground (p. 590). The *Pierre* case involved an unconstitutional application of a statute which was valid on its face. The denial of fundamental liberty occurred wholly through a factual situation whose parallel would be found here if the record showed "that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment".[45]

But if it be held that we err in this regard or that a weighing of the evidence in the light of the present danger rule is necessary, we submit that it is ample to support a conviction according to either standard.

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[43]301 U. S. 242.

[44]310 U. S. 296.

[45]As phrased by Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. 454, 460.

VII.

The Publication in Question Was Contemptuous According to Any Suggested Standard.

Judge Bishop said in his oral decision:

> "It was inevitable that the portions of that telegram which were published would be published if it were sent out and the ordinary course of affairs were carried through without interruption. Now, as inevitably—and there can be no argument, it seems to me, against this conclusion—that telegram, published due to its nature and due to its contents which were published, would inevitably interfere with the orderly administration of justice; not that it would cause the judge to change his mind, but it did embarrass and disturb the administration of justice and is as typical a case, it seems to me of a contempt, as several others might be, such as the Chronical case, and others." [R. 46.]

And formally adjudged:

> "* * * that, by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court, * * *." [R. 52.]

Counsel for petitioner make no contention that such was not the effect of the publication. Tacitly they concede that the reasonable or inherent tendency standard has been met. They review the evidence to the sole end of establishing that there was no present danger of interference or actual interference.

In view of this contention we feel impelled to place before this court certain existing local conditions which are not included in our former brief herein.

The Clear and Present Danger to the Independence of the Los Angeles Superior Court.

We are about to refer to matters which were before the trial judge, of which he could and presumably did take judicial notice, and which we think this court should likewise take into consideration by application of the same doctrine, for judicial notice applies to proceedings on review as well as in the trial court.[46]

They are matters which were well known locally. The Superior Court of Los Angeles County has fifty elective judges with no party sponsorship, and the Municipal Court of the City of Los Angeles has thirty judges similarly situated. The newspaper publishers and the labor leaders of Los Angeles, respectively, believe that the re-election of these judges is largely dependent upon their approval or disapproval. They have nurtured this thought in the minds of our elective judges, many of whom hold to the same view. There are at least 1,600,000 voters in Los Angeles County and 900,000 in the city alone; the 1938 figures are comparable.

The Los Angeles Bar Association's Committee for Preservation of Judicial Independence was formed at the urgent suggestion of the presiding judge for the year 1937, and it grew out of conditions resembling those of the Shuler era[47] when Rev. Bob Shuler, through threats and flattery, was engaged in an endeavor, which for a time approached appallingly close to success, to impose

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[46]*Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209; *City of Los Angeles v. Abbott*, 217 Cal. 184, 192, 193; *Wood v. Kennedy*, 117 Cal. App. 53, 60-61; *Estate of Barreiro*, 125 Cal. App. 752, 754; *Hollenbach v. Schnabel*, 101 Cal. 312, 315-316; *Schomer v. R. L. Craig Co.*, 137 Cal. App. 620, 627; *In re Blythe*, 108 Cal. 124, 126; *Sewell v. Johnson*, 165 Cal. 762, 768; *Gay v. Gay*, 146 Cal. 237, 241; *Allen v. Indus. Acc. Com.*, 3 Cal. (2d) 214, 215.

[47]*In re Shuler*, 210 Cal. 377.

his will upon the judges of the Superior Court concerning any litigation in which he happened to take an interest. But the more recent conditions, which were becoming progressively worse, involved a somewhat contemporaneous series of drives upon the judges by various pressure groups, such as the A. F. L. and C. I. O.; at the same time the practice of trying cases in the newspapers was growing in extent and obnoxiousness, and many attorneys were unfortunately lending themselves to the practice of giving to the newspapers advance statements of their views concerning the merits or the evidence about to be produced. A committee of one labor organization called upon the presiding judge in an effort to persuade him to replace the judge then in charge of the Order to Show Cause Department[48] with a judge whose economic and social views would be more acceptable to that organization. At about the same time one Heist, speaking on behalf of one of these labor groups, delivered over the radio a diatribe directed at the judge presiding in that department, and he mailed a copy of it to the then presiding judge. During litigation between McPherson and Crawford[49] someone mailed to each of the Superior Court judges a copy of one or more issues of a small newspaper which was freely discussing the merits of the case about to come to trial. During the *Markham* will case the Hollywood Red Ink, a newspaper (reputed to be controlled by one of the attorneys in that litigation), took such an active and partisan interest in the case that it became well-nigh impossible for the attorney for the contestee

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[48]The department of the Superior Court which handles preliminary injunctions, special writs and the like.

[49]Litigation between Aimee Semple McPherson and Rheba Splivalo Crawford concerning the Four Square Gospel Church.

to find a judge who would act on any matter pertaining to the case, even though related to some formal phase of it. During the pendency of the litigation involving the San Pedro Hiring Hall (the *Walker* case mentioned in Bridges' telegram), telegrams from Herman Bulcke, V. Wahlenmaier and other labor leaders were received by Judge Schmidt,[50] the trial judge, seeking to influence his action upon matters such as motion for new trial, etc. And petitioner Bridges, during that same proceeding, made an affidavit which, filed by Mr. Katz, one of the attorneys for defendants, resulted in his (Katz) punishment for contempt; the judgment was upheld by the rulings of the District Court of Appeal and the Supreme Court in *Matter of Katz*, Second Civil No. 11806. Bridges also sent to the Secretary of Labor and caused the newspapers to publish pertinent portions of the telegram now under consideration.

All of these things occurred before the hearing of the *Times* case (No. 64). During its progress the semi-annual report of Judge Wilson concerning the Order to Show Cause Department was rendered to the presiding judge and revealed the fact that 41 contempt matters had been handled in that department during the six months' period; but this covered only the one department of the court, and we have no way of knowing how many additional contempt matters there were. The above mentioned instances, some of which occurred before 1938, are but outstanding examples of a growing tendency of outsiders to attempt to bring pressure upon the court to render what they conceive to be just judgments. And among the 41

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[50]See: *Bulcke v. Super. Ct.*, 14 Cal. (2d) 510, and *Wahlenmaier v. Super. Ct.* 14 Cal. (2d) 799.

matters handled by Judge Wilson was the instance of the defiant dragging in the gutter of a copy of a temporary injunction rendered in a labor dispute, a thing which promptly became a matter of common knowledge.

While these things were occurring, most of them being attempts of the labor faction to impress their views upon the court, the Los Angeles Times, absorbing the spirit of the moment, fell into line and adopted or revived a policy of publishing editorials concerning the merits of these pending matters, again largely labor disputes; and these editorials became increasingly bold until they culminated in "Probation for Gorillas", wherein the Times directly addressed the trial judge and told him in no uncertain terms that on account of considerations of public policy (regardless of his view of the sufficiency of the evidence or the existence or gravity of errors or of extenuating circumstances) probation should be denied as an alternative to the commission of a grave mistake. The attitude of labor toward the courts had fairly indicated that there would be no hesitation in bringing pressure to bear upon the judge to grant probation to Shannon and Holmes, and it is a fair inference that the Times, foreseeing this, determined that, if within its power, it would prevent the successful exercise of that sort of influence and substitute its own judgment as that of the court. And so we have illustrated the grave evil of extramural arguments concerning pending matters. Labor, on the one hand, attempting to coerce the court into granting probation, and the Times, on the other, threatening and scolding that probation should not be granted.

If it be necessary to this proceeding to prove the existence of a clear and present danger, then we have it clearly

in the County of Los Angeles, at the time of the institution of the instant proceeding.

The Factual Background of the Telegram.

For several months prior to January 24, 1938, Presiding Judge Schmidt had been engaged intermittently in the trial of *Walker, et al., v. International Longshoremen's Association, District Local 38-82, et al.* This action, because of the parties thereto and the issues involved, attracted great public interest. Involving a controversy between representatives of rival labor organizations, more than ordinary interest was manifested by the general public in the evidence adduced and the rulings made from time to time by the court. As would be expected under such circumstances, the newspapers in Los Angeles County overlooked no opportunity to prominently display news accounts of what was happening in the court as the trial proceeded. Bitterness increased as charges and counter-charges were exchanged between the parties, all of which received considerable attention from the newspapers.

The issues and the situation existing in January of 1938 are given their proper setting by Judge Bishop in his decision upon demurrer:[51]

> "From the findings of fact[52] filed in the case we learn that the plaintiffs were fifteen of the more than a thousand members of the defendant corporation. This corporation (to be referred to hereafter as

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[51]As this opinion was omitted in printing the record in this court [R. 179], we present the Judge's language as our own summary of what the record shows.

[52]R. 10-25.

'Local 38-82') was a union of longshoremen operating in San Pedro and Long Beach harbors. Its exact relationship to other labor organizations mentioned does not clearly appear, but it would seem that it was granted its charter by the International Longshoremen's Association, and that it was bound by its charter or otherwise to pay a per capita tax to that parent organization and to an intermediate organization, the International Longshoremen's Association, Pacific Coast District, Local 38 (hereafter referred to as 'Pacific Coast District, Local 38'). Its articles of incorporation would lead to the conclusion that Local 38-82 received its charter from the American Federation of Labor; at all events, it was a part of that labor camp, for the International Longshoremen's Association was affiliated with the American Federation of Labor before the more recent events which gave rise to the action of Walker v. International Longshoremen's Association, District Local 38, and some representatives of employer organizations of the Pacific Coast harbor cities.

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"Turning our attention again to Local 38-82, we find that along about the first of September, 1937, its officers took action which had the effect of making it a C. I. O. organization instead of one loyal to the A. F. of L. By their direction, the per capita taxes were no longer paid to the Pacific Coast District, Local 38, nor to the International Longshoremen's Association, but instead were paid to the newly appearing International Longshoremen's & Warehousemen's Union, a C. I. O. affiliate. A charter was sought from the International Longshoremen's & Warehousemen's Union. Money was voted from the treasury of Local 38-82 to pay C. I. O.

organizers in the motion picture industry. New headquarters were opened up under the auspices of the International Longshoremen's & Warehousemen's Union, and the headquarters of Local 38-82 were left an empty shell. The hiring hall, formerly operated on behalf of the longshoremen by Local 38-82, was under the management of the International Longshoremen's & Warehousemen's Union. The monthly gross income of $8,000 was gone, as no dues for Local 38-82 were being collected.

"The trial court concluded that its articles of incorporation bound Local 38-82 to the A. F. of L. and that its officers could not lawfully take the various steps which transferred its allegiance from the A. F. of L. to the C. I. O. Based on this conclusion, the trial court entered a decree[53] permanently enjoining the officers of Local 38-82, as such, from using any of the funds of Local 38-82 for C. I. O. purposes and from attempting to have any affiliation with the C. I. O. So long as they remained members of Local 38-82, the officers who were defendants were further enjoined from 'attempting to operate any meeting hall or any hiring hall for any new union of longshoremen.' It was further adjudged that the expenditures on behalf of the C. I. O. and its International Longshoremen's & Warehousemen's Union were unlawful and should be accounted for.[54] A receiver was appointed[55] to take possession of the assets of Local 38-82, collect the dues owing to it by its members, and collect the moneys illegally used for the benefit of the C. I. O. He was also directed

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[53]R. 8-9.

[54]R. 24.

[55]R. 5, 6, 25, 34, 50.

'to participate actively in control of the San Pedro hiring hall and to carry out the working agreements through the members in good standing in said International Longshoremen's Association, Local 38-82; and to take all necessary steps to cause the International Longshoremen's & Warehousemen's Union to cease interference with the said agreements and with the control of the said hiring hall.' Immediately upon the entry of this decree and judgment a notice of intention to move for a new trial was made by the defendants affected by it."[56]

The judgment, which *inter alia* appointed a receiver, was signed and filed on January 21 and the receiver qualified on that day [R. 6]. On January 22, an order was made by the trial judge staying until January 29 proceedings in connection with his receivership order of the previous day, and on January 24, defendants filed their notice of intention to move for a new trial and a motion to vacate the judgment.

These proceedings, which took place in the period between January 21 and January 24, were thoroughly aired in the Los Angeles newspapers. Into this tense situation petitioner injected himself in a manner calculated not only to increase the bitterness then existing between the parties, but likewise in such fashion as to greatly embarrass the judge before whom that case was pending. On the very day of filing a motion to vacate the order which aroused petitioner's ire, he caused to be released for publication, under such circumstances as to leave no doubt as to his legal responsibility therefor, a telegram containing bitter criticism of the court's action. The

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[56]R. 6, 50-51.

newspapers in Los Angeles and San Francisco published on January 24 and 25 excerpts from this telegram and explanatory comments of petitioner thereon, under headlines proclaiming "Bridges Says Court Action Means Tieup" and "Secretary Perkins Gets Warning L. A. Edict May Close Coast Ports."[57]

The published telegram[58] characterized the court's decision as "outrageous", and the court in effect was challenged to attempt enforcement of its order. In this manner petitioner unmistakably told the judge that if the court's process was made effective, not only Los Angeles County but the entire west coast could expect the closing of its harbors and complete cessation of its vast shipping industry. The court was warned that I. L. W. U., "representing over 11,000 of the 12,000 longshoremen on Pacific Coast, does not intend to allow state courts to override the majority vote of members" [R. 51]. Further, said petitioner [Pro. "Ex. 2", R. 129]:

> "The court has ruled that 12 men own the contracts. Well, then, let the 12 men load the ships * * *. We may as well understand where we stand. If they can get away with this, it means the end of unions on the Pacific Coast."[59]

All this and more, as "Pro. Ex. 2" [R. 129-31] will disclose, petitioner in the presence of the world threw into the teeth of the judge who had just entered an important order in a trial involving issues of widespread

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[57]R. 129.

[58]R. 51.

[59]As will appear, the newspaper reporter who wrote this article verified this as a correct quotation of Bridges' statements made to him, and no denial was made by petitioner.

public interest, and to whom had been presented for calm, dispassionate and judicial consideration a motion which asked him to revoke the order and reverse himself. Parenthetically, that is exactly what the trial judge ultimately did.

The California Supreme Court summarized the effect of the published portions of the telegram as follows:

> "The published statement was not only a criticism of the decision of the court in an action then pending before said court, but was a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up. Furthermore, it contained a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision. When these statements are considered in connection with the extensive publicity that had already been given to the pending action, and the prominent position of the petitioner as the executive officer of an organization to which 11,000 longshoremen on the Pacific Coast belonged, we think that there can be no question that their publication in the metropolitan papers on the Pacific Coast, and particularly those in the county of Los Angeles in which said court was held, tended materially to affect the orderly administration of justice in the case to which reference was made and which was then pending in said court. If such would be the effect of such publication, and in our opinion, that was its effect, then the act of publishing such statements was a contempt of the court in which such action was pending" [R. 156].

Forthwith, at the presiding judge's request, investigation of the circumstances of the publication and of the

legal responsibility of petitioner was undertaken by the proper committee of the Los Angeles Bar Association, with the result that affidavits were filed charging Bridges with contempt in three counts. The first related to the filing of an affidavit by Bridges purporting, among other things, to explain said telegram [see R. 114-15], which was unfortunately omitted in printing the record herein; the second count forms the basis of the judgment now under review; and the third concerned alleged threats of strike and the holding of a short strike to intimidate the trial judge in the *Walker* case. An order directing petitioner herein to show cause why he should not be punished for contempt of court was promptly issued[60] and, having been renewed from time to time because of inability to serve him, such order was finally served.[61] Petitioner appeared and interposed a demurrer and a motion to quash. This resulted in dismissal of the first count, relating to the filing of the aforesaid affidavit. Issue was joined by verified answer as to the two remaining counts [R. 49]. The judge who issued the order to show cause, and who was alleged to have been contemned, withdrew and the case went to trial before a judge jointly selected by the parties. Petitioner upon trial was adjudged not guilty upon the third count and guilty upon the second. The trial judge imposed a small fine, stating that were he satisfied beyond a reasonable doubt that petitioner entertained a specific intent to influence or embarrass the court —the thing which his acts had an inherent tendency to bring about—the maximum penalty provided by law would be inadequate [R. 48].

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[60]On February 24, 1938 [R. 31].

[61]Sometime between May 24, 1938, and July 13, 1938 [R. 32].

Summary of Evidence.

This brings us to a presentation of the testimony adduced at the hearing. The trial judge said:

> "He (Bridges) dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not, an express command respecting publicity, you are going to have the publicity, because of the telegram, itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it, because it was an established custom. When the copy of that telegram was put in the hands of a man who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it directly to the newspapers. Certainly that will be my viewpoint, and I see no break in the causation there.
>
> "Now, the telegram, while we do not have the whole of it [fol. 174], I think that it is obvious that the reason that what we do have was published was that that was the colorful part of it. There is no drawing of punches in that telegram. Mr. Bridges cannot be criticized for that. Unfortunately, the wording of that telegram made it the sort of a telegram from which portions would be chosen for publication by the newspapers, and any part of it which was innocuous, was not published. The testimony is that Mr. Bridges read the whole telegram to the reporters and they chose what would make a story. It was inevitable that the portions of that telegram which were published would be published, if it were sent out and the ordinary course of affairs were carried through without interruption. Now, as in-

evitably—and there can be no argument, it seems to me, against this conclusion—that telegram, published due to its nature and due to its contents which were published, would inevitably interfere with the orderly administration of justice: not that it would cause the judge to change his mind, but it did embarrass and disturb the administration of justice and is as typical a case, it seems to me, of a contempt, as several others might be, such as the *Chronicle* case, and others. I am using the word 'inevitable' in the sense of something that follows as a matter of reason—not inevitable in that it is impossible not to be otherwise—but inevitable in that it is dead sure to occur, as the sending of the telegram under [fol. 175] the office set-up of Mr. Bridges and resulting in its publication in Southern California papers where this was a live issue" [R. 46-47].

And formally found:

"That on the 24th day of January, 1938, the defendant Harry R. Bridges dispatched a telegraphic message to Frances Perkins, Secretary of Labor in the Cabinet of the President of the United States * * *" [R. 51].

"That at or about the time of the sending of said telegram the defendant Harry R. Bridges caused a copy thereof to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and [fol. 184] would be, furnished to, and published in newspapers on the Pacific Coast and elsewhere, and said James D. O'Neil did give said telegram to newspaper reporters, and on the 24th and 25th days of January, 1938, the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los An-

geles, in the State of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere" [R. 52].

The California rule of review upon *certiorari* challenging a judgment of contempt was thus stated by the Supreme Court:

> "But in such a case, the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court" [R. 152].
>
> "In considering the evidence before the trial court in the light of the rule just stated, it is our sole duty to determine whether such evidence is of sufficient substantiality to support the judgment of conviction, or as stated in Daily v. Superior Court, *supra* (p. 124): 'In the proceedings before us, the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction'." [R. 153.][62]

And the California Supreme Court's appraisal of the evidence is found in the following quotation:

> "The judgment in said action was rendered on January 21, 1938. The petitioner was then in San Francisco, and on January 24th, from his headquarters in that city he dictated to his stenographer a telegram to the secretary of labor and gave a copy thereof to James D. O'Neil, a trained newspaper man of more than twenty years' standing, who was in charge of

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[62]To the same effect, see R. 134 of *Times-Mirror* case, No. 64, October Term, 1940.

the publicity bureau maintained by the petitioner as the executive officer of the C. I. O. in the city of San Francisco. O'Neil gave a copy of said telegram to one of the city papers of San Francisco and on that day and the following day that portion of the telegram set forth in the findings of the trial court was published in the metropolitan papers of the city of San Francisco and Los Angeles and elsewhere in this state.

"Upon this evidence the trial court found, 'That at or about the time of the sending of said telegram, the defendant, Harry R. Bridges, caused a copy thereto (thereof) to be given to one James D. O'Neil for the purpose and with the intent that the contents of the said telegram should, and (fol. 146) would be furnished to and published in the newspapers on the Pacific Coast and elsewhere.' It is contended by petitioner that the evidence does not support said finding. In discussing the evidence respecting the publication of said telegram, the trial court reasoned as follows: 'He (the petitioner) dictated it to his stenographer, his secretary, and told her to send it. There you have an express command. But if you do not (have) an express command respecting publicity, you are going to have publicity, because of the telegram itself. In dictating that telegram to his secretary, he did not need to tell her in words to send it, and certainly she knew when she sent the telegram what to do with a copy of it because it was an established custom. When the copy of that telegram was put in the hands of a man, who is in the organization for the purpose of giving the telegram—which is a news story in anybody's language—publicity, it was just the same as sending it direct to the newspapers.'

"(10) We are in entire agreement with the conclusion reached by the trial court in holding the pe-

titioner responsible for the publication of said telegram. Mr. O'Neil testified that he handled the publicity for the C. I. O. for the West Coast and had an office three doors from the reception room of the C. I. O. in San Francisco, and four doors from Mr. Bridges' office; that Mr. Bridges 'was news wherever he goes,' that he (O'Neil) handled the publicity of telegrams released or received by Mr. Bridges, that copies of all telegrams 'that had anything to do with the C. I. O., most of them came to my desk', and that he then determined whether any particular telegram was newsworthy and susceptible of being sent to the press for publication. We think that there can be no doubt from the testimony of Mr. O'Neil that petitioner not only had every reasonable ground to believe that his telegram would be given to the public press for publication but that the regulations of his organization made it the duty of O'Neil to see that the papers were apprised of the telegram in order that publicity might be given to its contents. In our opinion, there was ample evidence to sustain the finding of the trial court that petitioner gave to O'Neil the copy of the telegram sent to the secretary of labor with the intent that the contents thereof would be furnished to and published in the newspapers on the Pacific Coast and elsewhere." [R. 154-55.]

Not only does the record satisfy the test of review but it actually satisfies (if we were here concerned with that question) the *quantum* found by the trial judge to be present, namely, proof beyond a reasonable doubt [R. 47]. Petitioner's contention is thus reduced to one of mere error of the state courts in determining the facts or applying the local law thereto.

Authority of Bridges' Publicity Agent.

Petitioner, the record shows, is, and for some years past has been, a potent figure of national and even international proportions in that camp of organized labor known as the C. I. O. In January of 1938 he was president of the International Longshoremen's and Warehousemen's Union, an unincorporated organization with approximately 23,000 members on the Pacific Coast, and West Coast director of the C. I. O., likewise an unincorporated organization, whose membership assertedly ran into the millions. He maintained headquarters at San Francisco, and there as part of his organization, personaliy, in July, 1937, established and set up a publicity bureau. James D' O'Neil, a trained newspaperman of some twenty years' experience, was employed by petitioner as publicity agent, placed in charge of the bureau and instructed by petitioner as to the purposes which it was to serve. He testified:

> "Q. You have stated that this publicity bureau was set up, and the reason for setting it up. Under whose authority was this bureau set up and created, do you know?
>
> * * * * * * * *
>
> A. Under the authority of the director of the west coast C. I. O., Mr. Bridges.
>
> Q. And the functions of the bureau were discussed with Mr. Bridges at the time he authorized the setting up, and in fact set up the bureau, were they: that is, the purpose it was to serve? A. Yes, sir, certainly. [fol. 83.]
>
> Q. That was all discussed with Mr. Bridges? A. Yes.

Q. The mechanics as to how it was to operate was discussed with Mr. Bridges. A. He pretty much left the mechanics to me.

Q. I know, but when you were getting it set up and discussing the purposes and functions it was discussed generally with him, wasn't it? A. Not any more than in just a general way. He put me in charge and told me to run it and held me accountable." [R. 106.]

And petitioner Bridges:

"Q. With respect to communications which reach Mr. O'Neil's desk, who determines whether or not they will be [fol. 99] published and what publicity shall be given to them? A. O'Neil is given full charge. I might say we try to handle our organization that way. We don't hire a publicity expert and then tell him what to do, or have him told by people who are not publicity experts, and I am not a publicity expert." [R. 116.]

"The determination of the publicity end of it was left up to Mr. O'Neil, and I can't recollect doing anything in relation to that specific telegram." [R. 120.]

The established policy of this C. I. O. publicity bureau was that all of "the important correspondence" which O'Neil considered "to be noteworthy, or newsworthy" should be made public [R. 105], a policy adopted because of "difficulty in getting the truth about our aims and activities in the papers" [R. 105]. O'Neil was given full discretion concerning the publication of any such "newsworthy" matter [R. 100, 104]; Mr. Bridges placed no restrictions upon him [R. 102], except in the sense that

personal matters or others deemed improper for publication were not sent to his (O'Neil's) desk.

> "By that, I want to make it clear that I didn't get copies of any personal telegrams he [fol. 73] dispatched, or copies on union business, I don't get copies of those." [O'Neil, R. 100.]
>
> "A. Every day any telegrams on my desk that weren't to be released—if it wasn't to be released, it wouldn't be sent to the bureau.
>
> Q. As a matter of fact, if Mr. Bridges didn't want it [fol. 84] released, it wouldn't come to your desk? A. Not at all." [O'Neil, R. 107.]

The Preparation of the Telegram.

Having been informed by telephone of the status of the *Walker* case [R. 109], Bridges dictated the telegram in question and instructed his secretary to send it [R. 109]. The Secretary of Labor was already informed of the facts about the case.

> "The Court: So that the statement to that effect in the telegram was just reiterating a fact which they already had before them? A. Yes, I had notified them in the early part of the year. I was in Washington, D. C., and I personally notified them then." [Bridges, R. 121.]

The telegram told the Secretary nothing new; nor did it request any aid from her department. If it had, the entire context would have been voluntarily produced by petitioner's counsel.[63]

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[63]It could not be obtained otherwise (*Ex parte Gould*, 99 Cal. 360; *Hotaling v. Superior Court*, 191 Cal. 501, 505).

The telegram said in part: "Attempted enforcement Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast." But petitioner denied that he then knew the status of the Walker litigation or that he was thinking of Judge Schmidt at all—"we weren't even thinking of the Judge at that time" [R. 117]. "At that time, so far as I was concerned, I was not giving a thought to Judge Schmidt" [R. 118]. This, notwithstanding Judge Schmidt's name appears twice in the telegram and petitioner's explanatory comment. And the language of the telegram carried a recognition of the fact that the receiver had not taken possession of the hiring hall; that the "Schmidt decision" had not yet reached the stage of "attempted enforcement" and, breathing defiance, threatened reprisal in the shape of a coastwide strike in the event of "Attempted enforcement of Schmidt decision" [R. 51].

Petitioner's Intent That Telegram Be Published.

Petitioner knew that O'Neil, the publicity agent, was to have a copy of the telegram.

> "Q. When you dictated this telegram to your secretary, that was your end? A. So far as I was concerned.
>
> Q. You knew she was going to send the telegram and give Mr. O'Neil a copy? A. Yes, sir." [R. 120.]

For "any important matters, at some time or other all go over Mr. O'Neil's desk" [Bridges, R. 115]; and this was, of course, an important matter. O'Neil testified:

> "Q. Why would the copies come to your desk, Mr. O'Neil? A. Because all the publicity for all

of the C. I. O. was cleared through my office." [R. 100.]

Bridges knew [R. 124], and so did O'Neil, that such a telegram was news which would be disseminated by the newspapers throughout the country [R. 101-3]. And it was handled like any other publicity matter [R. 104, 114].

Immediately upon receipt of his copy, O'Neil called the San Francisco News, which was about to go to press [R. 102], and was the only San Francisco afternoon paper to whom the C. I. O. gave publicity matters [R. 102-3]. He read the telegram to its representative [R. 103, 108] and it printed a short news article, found at R. 128, which did not quote the telegram.

The managing editor of the San Francisco Chronicle thereupon assigned Lawrence Resner, one of its reporters, to get the story [R. 63]. He, as a result of frequent previous contacts [R. 64-66, 73], called O'Neil, who read to him the telegram while he typed it [R. 67], this being his first knowledge of its contents [R. 71]. The Chronicle wanted further information on the story [R. 69], so Resner called Bridges [R. 69] and got from him his version of the Walker situation; it was incorporated in an article written by Resner and published in the Chronicle on the 25th [R. 67]. It says in part:

> "In further explanation of his telegram, the longshoremen's president said: 'Judge Schmidt has actually ruled that the port of Los Angeles will be tied up. This means the automatic tieup of all other ports on the Coast.
>
> "'The court has ruled that 12 men own the contracts. Well, then, let the 12 men load the ships. The court is trying to force the longshoremen to join the I. L. A., and the men aren't going to do it.

"'If the courts can decide this, it also means that the courts can rule on whether or not we have the right to strike. It means that any two or three men can protest any economic action decided upon by the majority of the membership of the union.

"'We may as well understand where we stand. If they can get away with this, it means the end of unions on the Pacific Coast. There won't be anything but company unions', Bridges said." [R. 130.]

The quotations therein contained were verified by Resner as substantially correct reproductions of what Bridges said to him [R. 70, 72, 74-6, 86, 88]; and Bridges did not refute his testimony but really incorporated it by reference into his own [R. 117].

Both Bridges and O'Neil were familiar with the process by which Associated Press members make their news material available to other members and thus automatically disseminated throughout the nation [R. 119, 101-2], which process is described at R. 59-60.

Brian Bell, news editor of the Western Division of the Associated Press, in charge of its San Francisco and Los Angeles bureaus in January, 1938, testified [R. 59-61] that the Associated Press is a news-gathering organization, that its members in January, 1938, in Los Angeles, were the Los Angeles Times, the Los Angeles Examiner, the Los Angeles Herald & Express and the Hollywood Citizen-News; that under the contractual relationship existing between the Associated Press and its newspaper members, the former had the right to use any material appearing in member papers, and that during the month of January, 1938, the Associated Press bureau in San Francisco received, in advance of publication, a copy of all stories written by member papers, one of

which was the San Francisco Chronicle. Delivery to the Associated Press of carbon copies of all news stories written by reporters on the Chronicle, taken from a hook in the Chronicle office, would occur within a few minutes after the copy had been placed upon the hook. He testified further that he saw the story that went out on the Associated Press wires from San Francisco relating to the telegram in question and that the Associated Press acquired the story from the San Francisco Chronicle at about 7:30 o'clock in the evening of January 24, the story so acquired being the one which has heretofore been identified as "Pro. Ex. 2". This story was by the Associated Press, during the evening of January 24, placed upon its wire, and went to all member papers in Los Angeles.

The major Los Angeles newspapers being Associated Press members, the quoted portion of the telegram was forthwith printed in Los Angeles on the 24th and 25th [R. 52]. Petitioner's answer admits "that the excerpts of said telegram were published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, and admits that the sending of said telegram was made public and received wide and [fol. 162] general publicity" [R. 41]. This was but the natural sequence recognized by petitioner who testified:

> "Q. And the statements which you had given to newspaper reporters in San Francisco, to your knowledge, appeared as news items in other sections of the United States? A. Yes, that is correct." [R. 124.]

And by his publicity agent, who said:

> "Q. It is a matter of fact, is it not, that Mr. Bridges has been a dominating figure in the C. I. O. throughout the United States? A. He is news, wherever he goes.
>
> Q. And any statement that Mr. Bridges makes is considered by the newspapers as being newsworthy, is it not? A. It is.
>
> Q. Was it your duty to keep before the public the activities of Mr. Bridges, and the activities of the C. I. O. during the period of time you were acting as publicity agent for the C. I. O.? A. Yes, sir." [R. 99.]

The trial judge made a finding that "the defendant Harry R. Bridges caused a copy thereto to be given to one James D. O'Neil, for the purpose and with the intent that the contents of said telegram should, and [fol. 184] would be, furnished to and published in newspapers on the Pacific Coast and elsewhere" [R. 52]. Also:

> "* * * the portion of said telegram above set forth was published in newspapers of wide and general circulation in the cities of San Francisco and Los Angeles, in the state of California, and the sending of said telegram and the contents thereof were thus made public and received wide and general publicity in the County of Los Angeles and elsewhere." [R. 52.]

This means that it appeared in the Los Angeles Times, Los Angeles Examiner, Los Angeles Herald-Express and Hollywood Citizen News [Bell, R. 58]. The fact of the

circulation of these papers in and about the courthouse, of their being read by a large number of the fifty incumbent judges, is within the judicial knowledge of the Superior Court.

Toledo Newspaper Company v. United States is in point. The opinion of the Circuit Court of Appeals (later affirmed) had this to say on the subject (237 Fed. at 991):

> "It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the courthouse corridors, on the steps, or in the immediate vicinity of the courthouse. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that in a city like Toledo, and with a courthouse situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the courthouse windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts cannot, in any event, be fatal, but without intending to decide whether these facts may be necessary."

The Inherently Obstructive Quality of the Published Telegram.

Judge Bishop in his oral summary of the case expressed the view that the publication of the contents of this telegram was inevitable as a practical matter and "would inevitably interfere with the orderly administration of justice" because "it did embarrass and disturb the administration of justice" [R. 46]; and he formally adjudged that "by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court" [R. 52]. The soundness of these observations is emphasized by considerations to which the judge did not specifically refer.

Judge Schmidt could not be deemed ignorant of what everyone else in the community knew. The facts of the long, expensive and bloody coastwise strike of 1936 were so generally known that no one could ignore them. The telegram served notice of a strike of over 11,000 longshoremen on the Pacific Coast, practically all of such laborers, as an alternative to a reversal of the Schmidt ruling. The great shipping centers of the west had never recovered from the paralysis of the 1936 strike. Water commerce was still impaired and shipping companies headed for bankruptcy. With their paralysis would come that of every allied industry and perhaps, as in San Francisco in 1936, the disruption of delivery of food supplies to the cities of San Francisco, Seattle and Los Angeles. Riot and bloodshed were but reasonable incidents to expect in the event or a renewal of that strike, and upon Judge Schmidt's shoulders, as he would view it, rested

the burden of standing by his decision, of sustaining and enforcing the receivership order, of upholding the law as he construed it, on the one hand, or of yielding directly or indirectly to the pressure of adverse public sentiment which would lay at his door the sole responsibility for disrupting the commerce of the Pacific Coast, throwing thousands of men out of employment, precipitating physical violence, withholding supplies of butter, eggs, milk and what-not from the residents of large metropolitan centers. Such a prospect, facing the judge unless he changed his ruling or otherwise receded from the receivership, was bound to embarrass and to unconsciously influence him in one direction or another.

> "But it is folly to deceive ourselves and it is futile to attempt to deceive others. Threats of public clamor have before now swayed the judgments and flexed the purposes of resolute men, and it will be well to remember that what has happened may recur. Men have in the past yielded to the demands of an angry populace, and it is quite possible that they may yield again. Moral fiber is not stronger now than it ever was before." (*State v. Bee Publishing Company*, 60 Neb. 282; 83 N. W. at 206.)
>
> "A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice." (*In re San Francisco Chronicle*, 1 Cal. (2d) at 637.)

Judge Schmidt ultimately reversed himself in this matter and no man, not even the judge, will ever know the degree of influence which the knowledge of Bridges' threat had upon him.

VIII.

Petitioner Has Not Been Denied His Constitutional Right to Petition the Government for a Redress of Grievances.

Counsel, in Point I of the brief, state the point in dual fashion, as a denial of "freedom of speech and of the press" and of "the right to petition the Government for a redress of grievances" (Br. p. 25). The reason for this will become clear as the discussion proceeds.

The Telegram Was Not a Petition for Redress.

Petitioner's whole argument rests upon a gratuitous assumption. There is no basis in the record for asserting that the Bridges' telegram to Secretary Perkins was a petition for redress. Indeed, counsel for petitioner, at brief page 30, merely claim that Bridges, having been requested by Federal authorities "to advise such agencies of situations that endangered industrial peace", entertained the "sole purpose * * * to comply with such request and to advise these governmental agencies of a situation which, in his opinion, required the assistance of these Federal departments".

The telegram is quoted at R. 51 and, looking to the future, says: "Attempted enforcement of Schmidt decision will tie-up Port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override

the National Labor Relations Board". The Secretary is given no new facts, for she was already informed.

> "The Court: So that the statement to that effect in the telegram was just reiterating a fact which they already had before them? A. Yes, I had notified them in the early part of the year. I was in Washington, D. C., and I personally notified them then." [Bridges, R. 121.]

The telegram manifestly assumed knowledge on her part of the decision; it asked or petitioned for nothing at her hands. It merely breathed defiance of the Superior Court in case of "Attempted enforcement of Schmidt decision", which by the terms of the wire was shown to be an unexecuted order, the plain implication being that the receiver had not yet taken possession of the hiring hall. The inescapable inference is that the balance of the telegram would have been produced by petitioner if in fact it resembled a petition for redress of grievances in any respect (see authorities at pp. 28-29 of our former brief).

Petitioner's counsel describe the telegram as one "protesting against the decision of a local judge" (Br. p. 25), expressing Bridges' belief "that the union was aggrieved by the decision" (Br. p. 31), and "communicating such grievance to the appropriate Federal governmental agency" (Br. p. 31). He does not attempt to define the nature of the petition which he claims to have been implicit in the telegram, nor the sort of "redress of grievances" which it is claimed to have sought.

And the assertion that the Secretary of Labor was "the appropriate federal governmental agency" to redress the grievance of an erroneous state court decision is doubly

erroneous in that it assumes a right in the Federal Government to redress grievances growing out of state court errors and that it implies a right in the Executive Department to interrupt and divert the flow of the stream of justice. If there be attributed to this telegram any purpose whatever concerning the Secretary of Labor, it would be the urging of an unlawful thing upon her,—interference of some kind in the pending state court case. She had no legitimate function to perform with respect to it.

Although the California Supreme Court held that the state court was acting within its jurisdiction in the *Walker* case [R. 160] and had not been ousted through the pendency of a proceeding before the National Labor Relations Board, it is actually immaterial whether that conclusion is correct. If in fact Judge Schmidt was acting in excess of his jurisdiction, the proper place to establish that conclusion was in his court or upon appeal or through special writ such as prohibition, challenging his jurisdiction (*Gompers v. Buck's Stove & R. Co.*, 221 U. S. 419, 450; *United States v. Shipp*, 203 U. S. 563, 572; *United States v. Toledo Newspaper Co.*, 220 Fed. 458, 494-5 (D.C.); *United States v. French*, 9 Fed. Supp. 30, 31-32 (D.C. Mich.); *Russell v. United States*, 86 Fed. (2d) 389, 392 (8th C.C.A.); *Howat v. Kansas*, 258 U. S. 181, 189).

The Secretary of Labor had no right to expostulate with the trial judge concerning these pending matters; she possessed no power to interfere with the receiver's taking possession or conducting the hiring hall. Indeed, no Federal official at that stage of the case had any lawful right to physically obstruct execution of the state court's process. The *res* was in its custody, at least constructively. And if the Federal Government were to interfere, it could be only

through the interposition of the courts, not the executive branch. Even if it were to be conceded that the Labor Board had exclusive jurisdiction in the premises, the Secretary had no right to interfere directly or indirectly with the state court proceeding.

Mr. Fraenkel's *amicus curiae* brief suggests, at page 8, that it was proper for the Secretary of Labor to bring into play "her various agencies of mediation and conciliation", which can mean only an endeavor to compose the differences between the litigants and thus bring about a lawful disposition of the litigation. If a request for this were assumed to be the purport of the telegram, it would still fall far short of a petition for redress of grievances, for it would amount to an invitation to her to prevail upon the parties to forget, not to redress, the grievance.

"The tyranny of labels * * * must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other."[64] The mere assertion that this telegram was a petition for redress of grievances cannot be accepted at bar. For this liberty, like its cognate ones—rights of assembly, free speech and free press,—is to be viewed and construed in the light of its historic connotation.[65]

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[64]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. at 323.

[65]See: *U. S. v. Cruickshank*, 92 U. S. 542, 552; *De Jonge v. Oregon*, 299 U. S. 353, 364; *Hague v. Com. for Industrial Organization*, 307 U. S. 496, 516, 522; *State v. Butterworth*, 142 Atl. 57, 58 (N. J.).

The Historical Connotation of the Right to Petition for Redress of Grievances.

It is everywhere conceded that the right is not absolute, for, as Mr. Fraenkel says (p. 1) "no rights are absolute", and Mr. Wirin (Br. p. 33): "That there are limits to the exercise of the right to petition, as to all rights, constitutional or otherwise, is not denied."

And clearly the exercise of the right, in order to avoid abuse, must have some legitimate relation to the recognized object of its exercise; that object does not and never has been the influencing of pending court causes. The normal field for operation of this liberty is the influencing of the legislative or executive branch of Government. In the *Cruickshank* case the court refers to the "right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances", and in the *Hague* case Mr. Justice Stone referred to "the right of citizens to assemble for the purpose of petitioning Congress for the redress of grievances" (p. 522).[66]

We apprehend that the right of petition is not necessarily limited to addressing the legislative body; that it would be a proper method of advocating a pardon by the executive or a change in the rules of one of his administrative agencies or the exercise of his veto power concerning legislation. But historically and on principle the right of peti-

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[66]The guarantee of the California Constitution is: "The people shall have the right * * * to petition the legislature for redress of grievances" (Art. I, Sec. 10).

tion (in the sense of a petition by members of the public for redress of grievances or change of any existing state of affairs) has never applied to the courts and cannot be held so to apply. Just as speech which tends to influence a pending cause is an abuse of "free speech" and a newspaper publication having the same tendency is a violation of the freedom of the press, so a petition for grievances which is directed at the court rather than the legislature or the executive is an abuse of that liberty.

The historic conception of this right at the time of adoption of our Constitution and our Bill of Rights was such as to clearly show a limitation to executive and legislative matters.

During the fourteenth and into the fifteenth century petitions for redress of grievances were handled by Parliament itself, but the flood of unanswered petitions became so great that "The Lords * * *, in the fifteenth century, * * * pursued the only possible course, and turned them over to the Council. Thus the greater part of the jurisdiction which the Lords had grasped at, but could not hold, was abandoned to the officials who composed the Council; and, in the sixteenth century, it was divided between the Council, the Star Chamber, and the Chancery."[67] Until this transfer of jurisdiction, such petitions had pertained to private grievances as well as public. But the Court of Chancery gradually absorbed the handling of petitions relating to private wrongs, which became redressable through petition in equity at the instance of the aggrieved party and none other. This practice is the forerunner of our modern petition or bill in equity and had become stabil-

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[67]1 Holdsworth's History of English Law, p. 359.

ized long before American independence. At that time, the redress of private grievances having been delegated to the courts and the courts alone, the battle over the right of petition for redress of grievances, which was still raging in England, had narrowed into a battle over the right to address Parliament concerning legislative and executive matters.[68] Hence the guaranty incorporated in the Federal Constitution (and in the basic law of certain original states) was directed to the preservation of petitions to the legislature and the executive. Petitions relating to the redress of private wrongs had been adequately cared for through the recognition of the petition in Chancery filed and pursued by the aggrieved party and by him alone, a practice which had proved eminently satisfactory,—one which merges itself into the related doctrine of independence of the courts, likewise impliedly carried into the Federal Constitution.

The Only Permissible Petitions Affecting Pending Court Causes Are Those Prescribed for Use of the Parties.

The time-honored vehicle for redress of judicial grievances—errors of fact or law committed against a litigant—is the motion for new trial or rehearing, the prosecution of an appeal, or the seeking of an extraordinary jurisdictional writ such as prohibition, certiorari and the like. But what petitioner did was to publicly tell the Secretary of Labor (on the day of filing the motion for new trial) that dire consequences would follow any attempt to enforce the Schmidt receivership order. Counsel say this message was "a protest against the decision" (p. 25) and a notice

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[68]Holdsworth, pp. 370-372; 1 May on The Constitutional History of England, pp. 349-354.

to the public of "what steps were being taken to prevent a possible tie-up of shipping" (Br. p. 32), and to what end? Not to procure legitimate redress of the alleged grievance. If the correction of the decision was, as intimated, the objective, then petitioner was invoking or suggesting some indirect process, one not sanctioned by the law. Is this sort of correction of judicial error "implicit in the concept of ordered liberty"?[69] "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106). Clearly not.

The matter is well stated in 11 *Am. Jur.*, p. 1120, Sec. 325:

> "The right of petition, on the other hand, natural and inherent though it is, has never been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout the many centuries that the right of petition has been recognized, it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While the state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of adoption of the Constitution. That right never included the right to attempt to influence the decision of a court through the medium of a petition. *Petitions which have been established as part of judicial procedure are the only ones protected by the constitutional right so far as the courts are concerned.*

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[69] *Palko v. Connecticut*, 302 U. S. at 325.

"The right to petition is not completely unlimited. Like all other constitutional rights, it is subject to reasonable regulations to preserve and protect the general welfare. It is no more sacred than the right of free speech, and as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition."

In re Stolen, 193 Wis. 627, is cited in support of these principles and fully supports the same. The Supreme Court of Wisconsin had under consideration the disbarment of a certain attorney (one Stolen) who had resigned his office as judge. While "matters pending before the court for adjudication were questions of fact presented by the evidence contained in the report of the referee", a petition was presented to the court by sixty attorneys who sought leniency for Judge Stolen. The Supreme Court concluded that the document was a petition and not a brief and the signatories themselves asserted it to be such and claimed the right to thus address the court concerning a pending matter. The court said at page 629:

"It is a traditional conviction of civilized society everywhere that courts and juries, in the decision of issues of fact and law, should be immune from every extraneous influence; that facts should be decided upon evidence produced in court; and that the determination of such facts should be uninfluenced by bias, prejudice or sympathies."

At page 631:

"But it is said that the Constitution of this state, by section 4 of article I, provides that the right of the 'people * * * to petition the government, or any department thereof, shall never be abridged.'

It is said that the judiciary is a department of the government, and that the right to petition a court is therefore guaranteed by the Constitution. We concede without further discussion that the judiciary constitutes a department of the government. The provision of the Constitution, however, is that the right to petition shall never be 'abridged'. This language does not confer any new right, but secures existing rights."

After quoting from *United States v. Cruickshank*, the court continued:

"The right of petition may be conceded to be an inherent right of the citizen under all free governments. This right has existed side by side with that standard of conduct set up and observed by the judgment of civilized peoples that courts shall decide causes only upon sworn testimony produced in court, to which shall be applied principles of law applicable to the situation. The right of petition, natural and inherent though it be, has never, so far as we can discover, been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout many centuries the right of petition has been recognized, but it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While our state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of the adoption of the Constitution. That right shall never be abridged. That right, however, never included the right to attempt to influence the decision of a court through the medium of a petition. In fact, as the jurisdiction of courts expanded, the necessity for petitioning the government grew less. In an article

on this subject, to be found in volume XXI, Encyclopaedia Britannica, it is said:

"'Petitions to the Crown appear to have been at first for the redress of private and local grievances, or for remedies which the courts of law could not grant. As equity grew into a system, petitions of this kind not seeking legislative remedies tended to become superseded by bills in chancery.'

"Thus far our discussion has related to petitions as popularly understood. There is a class of petitions which may properly be addressed to courts. They are petitions which conform to the ordinary course of judicial procedure and serve to arouse the jurisdiction or action of the court upon justicable matters. This very proceeding was instituted by a petition signed by the officers of the Dane County Bar Association. That petition aroused the jurisdiction, or action, at least, of this court in the premises. Petitions which have been established as a part of judicial procedure may be presented to courts, and such petitions are the only ones protected by the constitutional provision here invoked."[70]

The Telegram Is to Be Measured by the Free Speech Guaranty, Not That Relating to Petitions for Redress.

Counsel for petitioner show at brief pages 26-27 that a petition for redress, an actual one, possesses a qualified privilege in the law of libel, but only a qualified one.

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[70]*Cf. In re Arnold*, 204 Cal. 175.

Thus counsel again concede that the right may be abused. And if the document which they assert to be a petition was not in fact one (as clearly appears here), if it was but a public protest against a decision, or a public statement of what measures were being taken to redress the grievance inhering in the erroneous ruling, or a mere request to the Secretary of Labor to procure mediation between the parties to the cause, or anything other than a petition for redress directed at some legislative or executive grievance, the document stands on the same plane as any other utterance, oral or written; it must be tested by the rules of free speech rather than the rules of petition for redress of grievances.

And so it will not do to say that the right to communicate with the Secretary of Labor necessarily connotes a right to publish all that is said to her. The message to her might well be privileged as a matter of general law, but its voluntary publication by the sender would destroy that immunity.[71] Publicity was not necessary to moving the Secretary to employ her functions as mediator. Indeed, she had requested that Bridges communicate by telephone or through some of her local representatives [Bridges, R. 110].

Mr. Hotchkiss, of the Los Angeles Times, may discuss freely his opinion pertaining to pending proceedings and what the ultimate disposition should be; but he cannot discuss them with the judge; nor can he send a mes-

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[71]36 *C. J.*, Sec. 219, p. 1248; 17 *R. C. L.*, Sec. 90, p. 344.

senger or a letter or telegram to communicate those views to the judge. By the same token, he cannot publish them under circumstances which will probably carry those sentiments into the judicial chambers of their own momentum—as in his widely-circularized metropolitan newspaper. And Mr. Bridges, while he may freely express his sentiments concerning the Schmidt decision to Secretary Perkins and to his own followers, cannot do so in the presence of the judge or in such manner as to be calculated to invade his deliberations upon pending matters. The California Supreme Court pointed out that: "It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty." And Judge Bishop placed his ruling on the same ground [R. 46-47].

The claim of a right or duty to inform all members of the union and the general public of "what steps were being taken to prevent a possible tieup of shipping" (Br. p. 32) presupposes that the telegram was in fact a petition. But this document was neither a petition in fact, nor was it intended to operate in any field where influence by petition is lawful; for many centuries it has been unlawful to thus influence the proceedings of a court of justice.

Applied to the instant telegram the argument for publicity is on a parity with that of the Los Angeles Times, which considers itself "qualified to give an informed

opinion" [R. 52, No. 64], as "a leader of community thought and action" [R. 44]. The Reverend Bob Shuler, believing that he had a call to reform the City of Los Angeles:

> "* * * became deeply and actively interested in the awakening, arousing and in forming a state of public opinion with relation to the offenses with which the aforesaid persons had been charged and with respect to the proper prosecution of said offenses. The petitioner was accustomed during said period to make use of the radio, through one of its largest broadcasting stations in that region, in order to give widespread publicity to his opinions and utterances upon whatever subjects he sought by such means to discuss, particularly upon the subject of the public scandal which had arisen by reason of the alleged criminal acts of the defendants in said original actions and of said officials in connection with the prosecution of the same; and it may not be denied that the petitioner herein had acquired and occupied a very large sphere of influence in the way of arousing, directing and leading public opinion with respect to said conspiracy and with respect to said officials who had been charged and who have been convicted of accepting bribes with a view to defeating public justice in the pursuit and conviction of the persons charged with said conspiracy." (210 Cal. at 383.)

The editor of the Toledo News-Bee believed that his "publications complained of related to a matter of public concern and were safeguarded from being made the basis

of contempt proceedings by the assuredly secured freedom of the press" (247 U. S. at 419). But the courts have held, and rightly, that this urge to convey an effective message to the public does not excuse utterances which have a direct tendency to interfere with the functioning of the judiciary and, hence, to impair its independence, a tendency to pollute the purity of the stream of justice.

The court should not lose sight of the fact that petitioner's conviction rests not upon the fact of telegraphing the Secretary of Labor, and not upon the *mere* fact of publication, but on the circumstance that the publication was made at such time and place and in such manner as to have an inherent tendency to interfere with the deliberations of the judge upon a pending judicial matter.

Petitioner's argument concerning the alleged invasion of federal authority is somewhat far fetched, for no federal agency has any right to interfere with state court proceedings except as it invokes the judicial processes of the federal courts in federal matters. No federal official is being prosecuted and, hence, discussion of his or her right to give publicity to the telegram after its receipt is beside the mark. Mr. Bridges does not personify or represent the federal government; he was not petitioning it; he was giving publicity on the doorstep of the court house to a tirade against the court's decision and to threats of dire consequences if the decision were not revoked. No principle of constitutional law sanctions that.

IX.

The Right of Petitioner to Pursue a Lawful Occupation Has Not Been Denied or Impaired.

Petitioner's argument proceeds upon the false assumption of a necessity of pure democracy in a labor union—a fiction. Petitioner contends not only for a democracy but for one which keeps each member fully informed on all matters and inferentially gives him a voice in it. Again we say the assumption and assertion is pure fiction. Mr. O'Neil, the C. I. O. publicity agent, testified:

> "By that, I want to make it clear that I didn't get copies of any personal telegrams he [fol. 73] dispatched, or *copies on union business,* I don't get copies of those" [R. 100].
>
> "A. Every day any telegrams on my desk that weren't to be released—if it wasn't to be released, it wouldn't be sent to the bureau.
>
> Q. As a matter of fact, if Mr. Bridges didn't want it released, it wouldn't come to your desk? A. Not at all" [R. 107].

And petitioner Bridges:

> "Well, we have many labor disputes come up; we might have a dispute in the northwest and I might wish them to adopt a certain kind of strategy against the employers; for example, well, we don't turn this over to Mr. O'Neil directly, but we turn it over in some other way. *We don't expose the matter to our employers. So these matters would not be published* and O'Neil knows that, and communications of that type would be sent to him for his information; not for publication, so he is informed at all times" [R. 115].

But if it were deemed by the union or its leader to be desirable to make public to its members through the newspapers all matters pertaining to the union, that would not be the measure of their right. Hotchkiss, Shuler and Cochran (Toledo News-Bee editor) thought that their position as leaders in the community made it highly desirable to disseminate their views to interested persons, but they ran into the barrier between free speech and its abuse. And it was definitely established as to two of them (and should be as to Hotchkiss) that one cannot set his own boundaries to free speech, and that he abuses a conceded liberty when he speaks at such time and in such manner as to probably inject extramural influences into judicial deliberations.

Counsel again proceed upon a forced and erroneous predicate when they say that the judgment at bar "penalizes the petitioner for a legitimate act in the exercise of his lawful occupation" (Br. p. 37). For the penalty assessed to petitioner was not imposed for a lawful act. He is not to be punished for sending the telegram or for the *mere* publication of it, but for the doing of the act in such a manner as to render it unlawful because of its inherent tendency to interfere with the court.

The cases cited by petitioner[72] uphold as a fundamental liberty the right to engage in a lawful occupation, but they do not hold or intimate that each laborer can define the legitimate scope of his own activities[73] or that the liberty can be permitted to invade the independence of

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[72]*Truax v. Raich*, 239 U. S. 33, 41; *Meyer v. Nebraska*, 262 U. S. 390, 399.

[73]See: 16 *C. J. S.*, Sec. 212, pp. 625-7; 6 *R. C. L.*, Sec. 252, p. 267.

the courts any more than the right of free speech or free press or petition for grievances.

Counsel observe at page 37: "To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby is in effect to completely nullify the constitutional right to engage in that occupation at all." This merely argues that some of the activities which petitioner considers essential to his vocation are unlawful; that he would have the court ignore the settled distinction[74] between forbidding a lawful occupation and regulating its conduct.

Trade unions and the vocation of labor leader grew up long after these principles were developed with respect to other lawful occupations. Neither the unions nor their leaders have exemptions from the restraints applicable to all other vocations. Like the publisher of a newspaper, the labor leader "has no special immunity from the application of general laws. He has no special privileges to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."[75]

> "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of

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[74] *Adams v. Tanner*, 244 U. S. 590.

[75] *Associated Press v. National Labor Rel. Bd.*, 301 U. S. at 133.

justice in pending causes before judicial tribunals and the judges thereof." (*In re Shuler*, 210 Cal. at 402.)

Contempt of court by a labor leader is a contempt of court as much as any other. The exercise of his prerogatives can no more be used to influence the disposition of pending causes than can the "freedom of the press" of the Los Angeles Times. The Supreme Court of California adequately disposed of this contention in the language found at R. 160.

It is submitted that no good ground for *certiorari* has been shown, that the writ should be dismissed; that the judgment herein should be affirmed in all respects.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1

HARRY BRIDGES,

vs. *Petitioner,*

STATE OF CALIFORNIA.

No. 3

THE TIMES-MIRROR COMPANY AND L. D. HOTCHKISS,

vs. *Petitioners,*

HE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENTS ON REARGUMENT.

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INDEX.

Subject Index.

	Page
Preliminary statement	1
The determination of what shall constitute a contempt of a State court and the mode and measure of punishment are matters exclusively within the domain of State control	1
The common law of two hundred years duration cannot be a denial of due process	6
Inherent or reasonable tendency the Historic Standard	6
Inherent or reasonable tendency has always been the California criterion	11
Nye v. United States is not opposed to inherent or reasonable tendency as the criterion for State courts exercising inherent powers	19
Considered as a statutory standard	25
Considered as a common law test	27
Reasonable tendency may be made a new statutory standard of guilt	30
Petitioners' attempts to differentiate between inherent tendency and clear present danger as applied to constructive contempts have proved futile	36
The actual obstruction test has been repeatedly rejected	37
Intent without success	39
The charge and the findings in each case	40
Bridges proceedings	40
Times-Mirror and Hotchkiss case	41
The sufficiency of the evidence to sustain the conviction is not open to review here	41
A judicial conviction of abuse of a liberty is not the equivalent of a statute forbidding its legitimate exercise	43
Decisions rendered at last term of this Court point unmistakably to an affirmance herein	44
No procedural questions are involved in either case	50
Subd. 13 of Sec. 1209, California Code of Civil Procedure, is concededly unconstitutional	51

Table of Cases Cited.

	Page
Abrams v. *United States*, 250 U. S. 616	40, 49
Aetna Life Ins. Co. v. *Duncan*, 266 U. S. 389	41
American Federation of Labor v. *Swing*, 312 U. S. 321	43, 47
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	11, 48
Barry, Ex parte, 85 Cal. 603	16
Beal v. *Missouri Pacific R. Corp.*, 312 U. S. 45	2
Briggs v. *Superior Court*, 211 Cal. 619	17
Brydonjack v. *State Bar*, 208 Cal. 439	24
Buckley, In re, 69 Cal. 1	17
Bulcke v. *Superior Court*, 14 Cal. (2d) 510	17
Cantwell v. *Connecticut*, 310 U. S. 296	44, 47, 48, 49
Carlson v. *California*, 310 U. S. 106	48
Charlton's Case, 2 My. & Cr. 316, 40 Eng. Rep. 661	37
Cincinnati St. Ry. Co. v. *Shell*, 193 U. S. 30	3
Converse, Ex parte, 137 U. S. 624	3
Cox v. *New Hampshire*, 312 U. S. 569	
Creely, Ex parte, 8 Cal. App. 715	40
Cuddy, In re, 131 U. S. 280	24
Dailey v. *Superior Court*, 112 Cal. 94	
Davis v. *Beason*, 133 U. S. 333	49
Debs v. *United States*, 249 U. S. 211	49
DeJonge v. *Oregon*, 299 U. S. 353	49
Eilenbecker v. *District Court*, 134 U. S. 31	24, 50
Erie R. Co. v. *Tompkins*, 304 U. S. 64	5
Fox v. *Washington*, 236 U. S. 273	33
Gasquet v. *Lapeyre*, 242 U. S. 367	5
Gelert v. *National City Bank*, 313 U. S. 221	2
Gitlow v. *New York*, 268 U. S. 652	5, 25, 27, 37, 49
Gorin v. *United States*, 312 U. S. 19	34
Gould, Ex parte, 99 Cal. 360	17
Grosjean v. *American Press Co.*, 297 U. S. 233	48
Hague v. *C. I. O.*, 307 U. S. 496	48
Harrison v. *Schaffner*, 312 U. S. 583	34
Herndon v. *Lowry*, 301 U. S. 241	25, 27, 28, 49
Hotaling v. *Superior Court*, 191 Cal. 501	17
Independent Pub. Co., In re, 228 Fed. 789	40
Jones, Ex parte, 13 Ves. Jr. 237, 33 Eng. Rep. 283	6
Kitcat v. *Sharp*, 52 Law J. N. S. Ch. 134	7
Lanzetta v. *New Jersey*, 306 U. S. 451	49

Page

Lindsley, In re, 75 Cal. App. 124 17
Lindsley v. *Superior Court*, 76 Cal. App. 428 17
Littler v. *Thomson*, 2 Beaven 129, 48 Eng. Rep. 1129 7
Lovell v. *Griffin*, 303 U. S. 444 48
McClatchy v. *Superior Court*, 119 Cal. 413 18
Michaelson v. *United States*, 266 U. S. 42 22
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287 3, 27, 42, 43, 47, 48, 49
Millholen v. *Riley*, 211 Cal. 29 24
Minersville School Dist. v. *Gobitis*, 310 U. S. 586 47, 49
Missouri v. *Lewis*, 101 U. S. 22 3
Morehead v. *New York ex Rel. Tipaldo*, 298 U. S. 587 51
Morris, In re, 194 Cal. 63 15
Nash v. *United States*, 229 U. S. 373 28
Near v. *Minnesota*, 283 U. S. 697 43, 47
Newport Light Co. v. *City of Newport*, 151 U. S. 527 5
Nye v. *United States*, 313 U. S. 33 7, 8, 9, 19, 20, 22, 24, 25, 50
Otis v. *Superior Court*, 148 Cal. 130 17
Overend v. *Superior Court*, 131 Cal. 280 17
Owen v. *Dancy*, 36 F. (2d) 882 5
Patterson v. *Colorado*, 205 U. S. 454 4, 7, 42
People v. *Bramigam*, 21 Cal. 342 12
People v. *White*, 334 Ill. 465 18
People v. *Wilson*, 64 Ill. 195 38
Plaquemines Tropical Fruit Co. v. *Henderson*, 170 U. S. 511 3
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Poulson, Ex parte, Fed. Cas. No. 11,350 (19 Fed. Cas. 1207) 24
Queen v. *O'Dogherty*, 5 Cox Crim. Law Cases 348 7
Rex v. *Davies*, 1 K. B. 32 7
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Rex v. *Tibbits*, L. R., 1 K. B. 77 37
Reynolds v. *United States*, 98 U. S. 145 49
Robson v. *Dodds*, 17 W. R. 782 7
San Francisco Chronicle, 1 Cal. (2d) 637 17, 38, 39
Schenck v. *United States*, 249 U. S. 47 49
Schneider v. *State*, 308 U. S. 147 48
Shortridge, In re, 99 Cal. 526 17, 18, 27, 51
Shuler, In re, 210 Cal. 402 17
Sinclair v. *United States*, 279 U. S. 749 8, 9, 37

Page

Skipworth's Case, L. R., 9 Q. B. 230 37
Skiriotes v. *Florida*, 313 U. S. 69 2
State Bank v. *Houston Pasture Co.*, 247 U. S. 240 51
Stromberg v. *California*, 283 U. S. 359 49
Thornhill v. *Alabama*, 310 U. S. 88 48
Tichborne v. *Tichborne*, 39 L. J. N. S. Ch. 398 7
Toledo Newspaper Co. v. *United States*, 246 U. S. 421, 7, 9, 10, 11, 19, 21, 22
Truax v. *Corrigan*, 257 U. S. 373 3
Tumey v. *State of Ohio*, 273 U. S. 510 3
Tyler, Matter of, 64 Cal. 434 16
Twining v. *New Jersey*, 211 U. S. 106 19
United Gas Public Service Co. v *Texas*, 303 U. S. 123 41
United States v. *New Bedford*, Fed. Cas. No. 15,867 (27 Fed. Cas. 91, 103) 24
Washington etc. Co. v. *National L. Rel. Bd.*, 301 U. S. 142 51
Water-Pierce Oil Co. v. *State of Texas*, 212 U. S. 86 30
Whitney v. *California*, 274 U. S. 373 49

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Oswald on Contempt of Court, p. 93 37
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Story on Constitution, Sec. 1884, p. 637 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1

HARRY BRIDGES,

vs. *Petitioner,*

STATE OF CALIFORNIA.

No. 3

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

vs. *Petitioners,*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

BRIEF FOR RESPONDENTS UPON REARGUMENT.

Preliminary Statement.

The time limit upon this brief and the questions common to both proceedings prompt us to tender a single brief for the above entitled causes. Any matters which are not common to both will be treated separately in the latter portion of this discussion.

THE DETERMINATION OF WHAT SHALL CONSTITUTE A CONTEMPT OF A STATE COURT AND THE MODE AND MEASURE OF PUNISHMENT ARE MATTERS EXCLUSIVELY WITHIN THE DOMAIN OF STATE CONTROL.

The original States, because they never surrendered them, have always had all of the powers of internal sovereignty.

And the newer States, by virtue of the pertinent constitutional provision [1] and its implications, enjoy like status.

Speaking of the State of Florida, the court said in *Skiriotes* v. *Florida*, 313 U. S. 69, 77:

> "Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. Florida was admitted to the Union 'on equal footing with the original States, in all respects whatsoever.' And the power given to Congress by § 3 of Article 4 of the Constitution to admit new States relates only to such States as are equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.' Coyle v. Smith, 221 U. S. 559, 567, 55 L. ed. 853, 858, 31 S. Ct. 688."

Within this field of State sovereignty are the right and duty to preserve order, protect persons and property and to those ends to establish and maintain courts of justice. What courts the State shall have and how they shall function are matters for State determination. The nature and extent of their implementation in order to function effectively is likewise a State matter.

Gelfert v. *National City Bank*, 313 U. S. 221, 235: " * the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, 'by what process legal rights may be asserted or legal obligations' enforced."

Speaking of injunction against criminal prosecutions under state law, this court said in *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45, 49:

> "The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state

[1] Article IV, Section 3.

courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds.* * *"

And in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 296:

"But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties. See Fox River Paper Co. *v.* Railroad Commission, 274 US 651, 655, 71 L ed 1279, 1283, 47 S Ct 669; Long Sault Development Co. v. Call, 242 US 272, 277, 61 L ed 294, 299, 37 S Ct 79. We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy."

And Mr. Justice Black, dissenting in the same case, said:

"In addition, I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the federal Constitution would amount to judicial usurpation." (p. 302)

Whether the independence of her courts can and should be best preserved by the slow processes of criminal indictment or by the more expeditious procedure of contempt is for each State to determine.[2] What acts should be over-

[2] *Missouri* v. *Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, 36; *Tumey* v. *State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511, 517; *Truax* v. *Corrigan*, 257 U. S. at 373-4, dissenting opinion; *Ex parte Converse*, 137 U. S. 624, 631-3.

looked and what ones punished present questions of policy falling wholly within the State's domain of authority. It was so held in *Patterson* v. *Colorado*, 205 U. S. 454, which involved a contempt of the Supreme Court of Colorado during the pendency of a petition for rehearing. The matter arose on error to the State court and the writ was dismissed for want of Federal jurisdiction. Speaking through Mr. Justice Holmes, the court said at page 459:

> "The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not open to re-examination here."

At page 460:

> "Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States. It is admitted that this may be true in some other sense, but it is not true, it is said, for the purpose of fixing the limits of possible contempts. But here again the plaintiff in error confounds the argument as to the common law, or as to what it might be wise and humane to hold, with that concerning the state's constitutional power. If a state should see fit to provide in its Constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the court affected retained authority to modify its judgment, the 14th Amendment would not forbid. The only question for this court is the power of the state."

At page 461:

> "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law."

And at page 463:

> "It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. *City of Newport*, 151 U. S. 527;
Owen v. *Dancy*, 36 F. (2d) 882, 884;
Gasquet v. *Lapeyre*, 242 U. S. 367, 369.

The *Patterson* case has never been overruled or criticized as to this actual holding, although the doubts expressed concerning the absorption of the 1st Amendment by the 14th have been dissolved through later decisions beginning with *Gitlow* v. *New York*, 268 U. S. 652.

The soundness of Mr. Justice Holmes' viewpoint is emphasized by the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, quoted at pages 4 and 5 of Bridges Brief in Opposition to Petition[3] and at pages 32 and 33 of Times Brief in Opposition to Petition.[4]

If there be no right of Federal interference with the execution of the criminal laws of a State (in the absence of violation of the 14th Amendment) and no right to impose a so-called Federal common law upon civil transactions not arising under the Federal Statutes or Constitution, how can it be said that there is some Federal power, whether legislative or judicial, to delimit for the State the scope of contempt of its own courts or the manner of punishing same?

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[3] Hereinafter referred to as first Bridges brief.

[4] Hereinafter referred to as first Times brief.

In the field of contempt law the State is subject, as in criminal and domestic civil matters, only to those Federal limitations imposed upon it by the 14th Amendment, namely, due process and equal protection of the laws. We are presently concerned with due process only, and from that standpoint antiquity of a given process is the hallmark of acceptability, whether the matter be viewed adjectively or substantively. If inherent or reasonable tendency to influence or otherwise interfere with the deliberations of a court in a pending matter was an established criterion of constructive contempt at the time of the adoption of the Federal Constitution, its application today cannot constitute a denial of due process.

THE COMMON LAW OF TWO HUNDRED YEARS DURATION CANNOT BE A DENIAL OF DUE PROCESS.

Inherent or Reasonable Tendency the Historic Standard.

The inherent or reasonable tendency criterion has been established for constructive contempt for a period of two hundred years or more.

The matter is discussed at pages 8-17, 46-49 of Supplemental Brief on Behalf of Respondent in *Bridges* case[5] and at pages 8-18, 45-47 of Supplemental Brief on Behalf of Respondent in *Times* case.[6]

English cases in point and additional to those heretofore cited are the following:

Pool v. *Sacheverel*, 1 P. Wms. 675; 24 Eng. Rep. 565 (1729);

Ex parte Jones, 13 Ves. Jr. 237; 33 Eng. Rep. 283 (1806);

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[5] Hereinafter referred to as Bridges supplemental brief

[6] Hereinafter referred to as Times supplemental brief.

Littler v. *Thomson*, 2 Beavan 129; 48 Eng. Rep. 1129 (1839);
Queen v. *O'Dogherty*, 5 Cox Crim. Law Cases 348 (1848);
Tichborne v. *Tichborne*, 39 L. J. N. S. Ch. 398 (1870);
Rex v. *Parke*, 2 K. B. 432 (1903);
Rex v. *Davies*, 1 K. B. 32 (1906);
Kitcat v. *Sharp*, 52 Law J. N. S. Ch. 134 (1883);
Robson v. *Dodds*, 17 W. R. 782 (1869).

The pertinent language of *Patterson* v. *Colorado*, 205 U. S. 454, is quoted at pages 12-13 Bridges Supp. Brief and pages 12-13 Times Supp. Brief.

The doctrine of that decision was adopted and applied in *Toledo Newspaper Co.* v. *United States*, 246 U. S. at 421. Although this case was overruled by *Nye* v. *United States*, 313 U. S. 33, its repudiation was confined to the procedural phase of the matter, namely, the question of whether constructive contempts can be deemed to have occurred" so near thereto (the court) as to obstruct the administration of justice", it being held that the phrase "so near thereto" has a geographical and not a causal connotation. But the court in the *Nye* case carefully refrained from deciding the questions presented at bar, limited its decision to "a problem of statutory construction, not • • • a question as to the constitutionally permissible scope of the contempt power" (p. 50); and the decision seems to carry an implication that the reasonable tendency phase of the *Toledo* decision, so far as concerns the ingredients of an offense against the court, is sound. We infer this from the following language:

> "If 'so near thereto' be given a causal meaning, then § 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas,

> Problems of Contempt of Court (1934) chap. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' Toledo Newspaper Co. *v.* United States, supra (247 U. S. p. 421, 62 L. ed. 1194, 38 S. Ct. 560) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, The History of Contempt of Court (1927) chap. IX. The result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2, 1931 will be absorbed as contempts wherever they may take place." (p. 49)
>
> "So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential." (p. 52)

The language last quoted could mean but one thing: That the tendency of the communication, not its effect, is the criterion of a constructive contempt. And that the conduct in question amounted to a contempt (though punishable only by indictment) is recognized at page 52 as follows:

> "But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity."

Mr. Justice Stone aptly observed at page 54:

> "* * * and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances."

Recognition of the tendency rule is also inferable from the fact that *Sinclair* v. *United States*, 279 U. S. 749, was cited in the *Nye* decision (at page 49) with apparent approval.

In that case, a unanimous decision (in which Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo participated), the language of the *Toledo Newspaper Company* case was quoted. And the court applied the tendency test to the facts in determining the existence of a contempt. That was a jury shadowing case which required the decision of two points: (1) whether the offense occurred "so near" to the court as to comply with the Federal statute; and (2) whether, indeed, the jury shadowing amounted to an offense. The court plainly construed and applied the statute in the same manner as the *Nye* case, and it was to that point that it was cited in the latter decision. The court found in the *Sinclair* case that the acts in question occurred in and about the courtroom and were, therefore, within the terms of the statute governing the procedural phase of the matter, namely, the right to summary punishment. The substantive question turned upon the same construction of the Federal statute which Mr. Justice Holmes had advanced in the *Toledo* case:

> "They challenged the sufficiency of the petition to charge anything done in the presence of the court, or near thereto, which obstructed or impeded due administration of justice, or tended so to do." (p. 753.)

> "Council maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within Sec. 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation." (p. 762.)

The court's opinion conceded that:

> "The evidence does not disclose that any operative was instructed to approach, or did approach, a juror,

nor does it disclose that any juror actually knew that he was being shadowed. Some were suspicious. The court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed," (p. 758)

but definitely rejected the obstruction principle, saying, at page 762:

"The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of selfpreservation."

The portion of the *Toledo* decision expounding the reasonable tendency doctrine was then quoted with approval, and the court further said, at page 764:

"Under the doctrine so stated, we think the trial judge rightly held it unnecessary to allege or show actual contact between an operative of the detective agency and a juror, or that any juror had knowledge of being observed. The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

and

"The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly, they were not less remote than the publication denounced in Toledo Newspaper Co. *v.* United States. There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was towards evil, the destruction, indeed, of trial by jury." (p. 765)

Here is a clear rejection of the actual obstruction doctrine in favor of the enunciation and application of the

reasonable tendency criterion, and Mr. Justice Holmes and Mr. Justice Brandeis, who had dissented in the *Toledo* case, joined in the ruling.

This case cannot be differentiated, as counsel for petitioners would do, upon the ground that it is not a contempt by publication. Newspapers stand in no different category from other contemners.

Associated Press v. *National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of Court."

A criterion which is sufficiently definite for other offenders must be held good for newspapers and labor leaders.

Story on Constitution, Sec. 1884, p. 637:

> "There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government."

Inherent or Reasonable Tendency Has Always Been the California Criterion.

This test has prevailed in California throughout its history, both before and after adoption of the 14th Amendment in 1868.

Judge Parsons applied it to a newspaper publication in 1851 (1 Cal. 536, 543); an attempt was made to impeach him and the Legislative Committee concluded that he had applied the law as it existed (1 Cal. 536, 554). A *dictum* of Mr. Justice Field to the same effect appears in *People* v. *Bramigam*, 21 Cal. at 342, decided in 1863.

The California Practice Act, which was adopted in 1851, contained a section (480) reading as follows:

> "The following acts or omissions shall be deemed contempts:
>
> "*First.* Disorderly, contemptuous, or insolent behavior towards the judge whilst holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, *tending to interrupt*[7] the due course of a trial, reference, or arbitration, or other judicial proceeding:
>
> "*Second.* A breach of the peace, boisterous conduct, or violent disturbance in presence of the court or its immediate vicinity, *tending to interrupt* the due course of a trial, or other judicial proceeding:
>
> "*Third.* Disobedience or resistance to any lawful writ, order, rule, or process, issued by the court, or judge at chambers:
>
> "*Fourth.* Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness:
>
> "*Fifth.* Rescuing any person or property in the custody of any officer, by virtue of an order of process of such court or judge at chambers." (Vol. 2, *Hittell's Gen. Laws of California* 1850-1864, Title 13, Sec. 5414.)

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[7] All italics ours unless otherwise indicated.

This Act was superseded by the Code of Civil Procedure enacted in 1872 and Sec. 1209 thereof, as initially passed, read as follows:

"The following acts or omissions in respect to a Court of justice, or proceedings therein, are contempts of the authority of the Court:

"1. Disorderly, contemptuous, or insolvent behavior toward the Judge while holding the Court, *tending to interrupt* the due course of a trial or other judicial proceeding;

"2. A breach of the peace, boisterous conduct, or violent disturbance, *tending to interrupt* the due course of a trial or other judicial proceeding;

"3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, Clerk, Sheriff, Coroner, or other person appointed or elected to perform a judicial or ministerial service;

"4. Deceit or abuse of the process of proceedings of the Court by a party to an action or special proceeding;

"5. Disobedience of any lawful judgment, order, or process of the Court;

"6. Assuming to be an officer, attorney, counsel of a Court, and acting as such without authority;

"7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such Court;

"8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from the Court where the action is on the calendar for trial;

"9. *Any other unlawful interference* with the process or proceedings of a Court;

"10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

"11. When summoned as a juror in a Court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such Court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the Court;

"12. Disobedience, by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior Court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer."

The Code Commissioner's note in the 1872 edition indicates that this section was borrowed from the Revised Statutes of Minnesota, Chap. 87. And an examination of the General Statutes of Minnesota (1866), page 570, shows that California's original Sec. 1209 is an exact copy of Sec. 1 of Chap. 87 of the Minnesota Statutes.

Political Code, Sec. 4468, also enacted in 1872, imports the common law into California jurisprudence in the following language:

"*Common law. When rule of decision.* The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution of laws of this state, is the rule of decision in all the courts of this state."

It will be noted that the tendency test was expressly adopted in California as to Subds. 1 and 2 of the statute, both in 1851 and in 1872, and has remained in Sec. 1209 to date; that it was likewise impliedly adopted by Subd. 9 which, through its phrase "any other unlawful interference with the * * * proceedings of a court", incorporated the

existing common law test of unlawful interference which included and connoted inherent or reasonable tendency to influence or otherwise interfere.

It is interesting to observe that, while the influence of the New York Statute of 1829 was strong in bringing about the 1931 Federal enactment (see Thomas on Problems on Contempt of Court, p. 55), it undoubtedly was also the basis of Sec. 166 of the California Penal Code,[8] the 1872 edition of which contains a Code Commissioner's note showing the section to be based on Field's draft of Sec. 201 of the New York Penal Code. California's Sec. 166 is a copy of said Sec. 201 with immaterial variations in Subds. 2, 7 and 8. The Field draft shows that said Sec. 201 was "framed upon the existing provisions of 2 Rev. Stat., 278, Sec. 10, Id., 692, Sec. 14, modified to extend to all courts, instead of to courts of record only." And the footnote on page 67 relating to Subd. 7 contains this:

> "Subd. 7. It has been decided that a publication, pending a suit, reflecting upon the court, the parties, witnesses, jurors or counsel, or intended to prejudice the public mind in regard to the cause, is a contempt. Bayard *v.* Passmore, 3 Leak's Penn., 438; Van Hook's case, 3 City H. Rec., 64; Noah's case, Id., 31: Respublica *v.* Oswald, 1 Dall., 319; Hollingsworth *v.* Duane, Wall., 77, 102."

Said Sec. 2 of the New York Revised Statutes is quoted at pages 528-29 of 28 Col. Law Review.

Whereas the Federal statute made "obstruction" the test, the California Penal Code made "direct tendency" the test. And the codifiers departed entirely from the New York statute in framing the provisions of the Code of Civil Procedure, borrowed it from Minnesota, and incorporated not only "tendency" as a criterion (Subds. 1 and 2) for acts

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[8] Which provides a cumulative remedy so far as it overlaps the field of Sec. 1209 C. C. P. In re Morris, 194 Cal. 63.

which must be actually obstructive under the Federal statute, but also adopted the common law as to contempts generally.

And the California decisions have uniformly held this to be the proper criterion, sometimes referring to Subd. 9 and sometimes stating the matter as one of definition under the inherent power of the court.

Matter of Tyler, 64 Cal. 434, 438 (1884):

> "'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' (Bishop's Criminal Law, § 216.) It would be strange if, under a government of law, it were otherwise. On the part of an attorney, it is not only a violation of the duty which he owes to the court, but an inexcusably unlawful interference with its proceedings (subs. 3, 9, § 1209, Code Civ. Proc.), directly tending to impair the respect due to its authority. (§ 166, Pen. Code.) As such, the act of the petitioner was punishable not only as a contempt of court, but as an offense against the criminal law."

Ex parte Barry, 85 Cal. 603, 607:

> "The language used was well calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure.
>
> "It seems to us to be too clear for argument that the publication was made at such a time as to affect or have a tendency to affect the proceeding then pending in court, and this contention of the petitioner cannot prevail. The act complained of was an 'unlawful interference with the proceedings of a court.' and therefore within subdivision 9 of section 1209 of the Code of Civil Procedure. This being so, the citation of other authorities to support the contention of respondent, that the publication of the article was a contempt of court, is unnecessary."

To the same effect are:

In re Shortridge, 99 Cal. 526, 632, 533;
In re Shuler, 210 Cal. at 402;
In re Lindsley, 75 Cal. App. at 124;
Lindsley v. *Superior Court*, 76 Cal. App. at 428;
In re San Francisco Chronicle, 1 Cal. (2d) at 637.

Although it is now firmly established in California that contempt is an inherent power residing in courts created by the State constitution (*e. g.*, Superior Court, Article VI, Sec. 6), a power which cannot be substantially impaired by legislation (Bridges R. 147-8), it should be borne in mind that the state law permits no "summary laying by the heels" of offenders; that its procedure provides for notice and full opportunity to be heard, and that the courts have yielded to the Legislature the right to control all adjective phases of the matter and, indeed, have imposed upon themselves by their own rulings certain limitations upon the scope of the definition of contempt.

That the method of procedure and the quantum of punishment may be fixed by statute is established by *In re Garner*, 179 Cal. 409. So far does this rule go that failure to state in the charging affidavit facts constituting a contempt destroys the jurisdiction (5 Cal. Jur. Sec. 38, p. 938; *Overend* v. *Superior Court*, 131 Cal. 280, 284; *Otis* v. *Superior Court*, 148 Cal. 130).

Proof of the offense must be made beyond a reasonable doubt (R. 47, 173; *In re Buckley*, 69 Cal. 1; *Hotaling* v. *Superior Court*, 191 Cal. 501). And the respondent cannot be compelled to testify (*Ex parte Gould*, 99 Cal. 360; *Hotaling* v. *Superior Court, supra*).

The provisions of Sec. 170 C. C. P. relating to change of judges because of prejudice have been extended by court decision to constructive contempts (*Briggs* v. *Superior Court*, 211 Cal. 619, 630; *Bulcke* v. *Superior Court*, 14 Cal. (2d) 510).

The power does not extend to prohibiting contempts by orders made in advance (*Dailey* v. *Superior Court*, 112 Cal. 94; *In re Shortridge*, 99 Cal. at 530); nor to a mere personal altercation with the judge (*McClatchy* v. *Superior Court*, 119 Cal. 413).

True news accounts of court proceedings cannot be punished (*In re Shortridge*, 99 Cal. 526), nor can publications or other comments which apply to cases which have terminated or to closed phases of a pending case (*In re Shuler*, 210 Cal. at 387).

It is also conceded that the Legislature may enlarge the contempt power (*In re Shortridge*, 99 Cal. at 532; see also 17 C. J. S., Sec. 43, p. 60; 12 Am. Jur., Sec. 49, p. 424; *People* v. *White*, 334 Ill. 465, 484).

But upon the one thing necessary to preserve their independence, *i. e.*, determination of what constitutes the substantive offense of contempt, the courts have held the Legislature to be powerless. And this is the basis for declaring the amendment to Subd. 13 of Sec. 1209 C. C. P. unconstitutional. That amendment was not directed at summary punishment; it sought to exempt publications relating to pending causes from any punishment in any sort of a proceeding.

Inherent or reasonable tendency is also the general American criterion of constructive contempt, as appears from the following encyclopedias and authorities cited therein:

17 C. J. S., Sec. 30 a, pp. 41-42;
12 Am. Jur., Secs. 31-32, pp. 412-13; Sec. 37, p. 417;
6 R. C. L., Secs. 20-21, pp. 508-9.

An inherent tendency, a direct tendency or a reasonable tendency is one and the same thing. Indeed, the Bridges petition concedes inherent tendency and reasonable tendency to be identical tests (Petn. p. 11), as does the Opening Brief at pages 14-15.

Petitioner should be able to advance some overwhelming reason as a basis for urging this Court to reverse the Sinclair ruling and then impose its now concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, he should be able to furnish an affirmative answer to the query whether his "present danger" doctrine "is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining* v. *New Jersey*, 211 U. S. at 106).

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and present danger has never found its way into the law of contempt.

> "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted" (Railroad Com. *v.* Rowan & Nichols Oil Co. 310 U. S. at 580-81).
>
> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." (Twining *v.* New Jersey, 211 U. S. at 106-7).

Nye v. *United States Is Not Opposed to Inherent or Reasonable Tendency As the Criterion For State Courts Exercising Inherent Powers.*

The overruling of the *Toledo Newspaper Company* case by *Nye* v. *United States*, 313 U. S. 33, was carefully limited in such manner as to leave our present question open. It dealt only with the effect of the Federal statute which defines the method of procedure for punishment of various

types of contempt and limits those which may be summarily dealt with. Petitioner Bridges' Brief on Reargument concedes that this does not present a constitutional question, saying at page 9:

> "But controversy has raged with regard to the other three categories; in large part whether punishment should take the form of the summary method of contempt or the more protective method of indictment. With that controversy, we shall not concern ourselves, believing that it raises no issue under the federal constitution."

Petitioner Times-Mirror's Brief on Reargument at page 2:

> "We emphasize the circumstance that in violation of the state statute, petitioners were prosecuted summarily and convicted of crimes punishable by imprisonment, not because prosecution by a group of private attorneys, the denial of a jury trial, and the disregard for the legislative declaration of state policy present a federal question, but because this court of recent date has announced its grave concern when 'the vital individual freedoms guaranteed by the First Amendment' are 'partially whittled away' by the courts 'acting without a jury in the exercise of its broad power to punish for contempt'."

The prevailing opinion in the *Nye* case carefully explained that:

> "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power." (p. 50)

And Mr. Justice Stone's dissent:

> "We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten

years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power 'shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice.' (4 Stat. at L. 487, chap. 99, 28 USCA § 385.)

"The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner which it is not denied, is 'misbehavior' although not in the presence of the court, and which it is admitted seriously obstructed the administration of justice in a cause pending in the court." (p. 53)

The significance of this careful limitation of the question under consideration and of the basis for reversal of the *Toledo* case is emphasized by reference to Frankfurter's and Landis' Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harvard Law Review, page 1010, where in footnote 3 the authors say:

"We shall restrict ourselves, likewise, to the constitutional issues involved in the regulation of contempts in the Federal courts. We shall disregard State authorities. They contribute only confusion to an inquiry into the problems raised by the Federal courts. Differences due to differences in constitutional provisions, judicial history and State legislation make resort to State cases treacherous and unscientific. 'The law relating to contempts in the courts of the United States is often lost sight of, if understood, and confused with the law in other jurisdictions, differing in many essential particulars, restricted by legislation and diverse decisions.' In re Perkins, 100 Fed. 950, 952 (E. D. N. C., 1900)."

The *Nye* decision was carefully confined, as was Mr. Justice Holmes' dissent in the *Toledo* case, to a question of statutory construction. "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the powers of the courts," said Mr. Justice Holmes (p. 424), and "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power", says Mr. Justice Douglas (p. 50). Both opinions in the *Nye* case recognize the fact of a contempt, as did Mr. Justice Holmes in the *Toledo* case; the point of divergence was merely the effect of the statutory prescription of method of punishment. In the prevailing *Nye* opinion, it is said at page 52: "But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity"; the quotation from page 50, first hereinabove set forth and the citation without criticism of the *Sinclair* case, seem to amount to a tacit approval of the reasonable tendency criterion.

Indeed, the *Nye* decision is but a reversion to the viewpoint of *Michaelson* v. *United States*, 266 U. S. 42, wherein the validity of the guaranty of jury trial of contempts committed under the Clayton Act was under consideration. Holding it valid, the court said in part at page 65:

> "The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress (Ex parte Robinson, 19 Wall. 505, 510, 511; Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 326) * * *. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character."

Reference to the *Robinson* and *Bessette* cases shows that the court there had in mind the statutory nature of the inferior Federal Courts, a matter which was emphasized in the *Robinson* opinion (86 U. S., at pages 510-11) as follows:

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831. 4 Stat. at L. 487. The Act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence, or subsequent Acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted."

And the same thought is expressed in footnote 2 of 37 Harvard Law Review, page 1010, as follows:

> "This paper is confined to a discussion of Congressional power over procedure regulating the trial of criminal contempts in the 'inferior Courts,' and puts to one side the power of Congress to regulate or limit the procedure of the Supreme Court. The constitutional differences between the inferior courts and the Supreme Court are decisive in many ways, and they may be operative in the present question. See Ex parte

Robinson, 19 Wall. (U. S.) 505, 510-511 (1873), infra, p. 1028."

Turning again to the *Nye* decision, we find that the cited cases, so far as they discuss the constitutional validity of the 1831 statute, attribute it to the statutory nature of inferior Federal courts and the doctrine that the legislative branch which confers power may limit or withdraw it. The matter is fully discussed in *Ex parte Poulson*, Fed. Cas. No. 11,350 (19 Fed. Cas. at p. 1207). *United States* v. *New Bedford*, Fed. Cas. No. 15,867 (27 Fed. Cas. 91,103); *Re Cuddy*, 131 U. S. 280, 285; and *Eilenbecker* v. *District Court*, 134 U. S. 31, also show the statutory origin of the court to be the basis for upholding the limitation upon the court's contempt power. The other cases cited at page 48 of 313 U. S. do not discuss the particular point.

The matter has never been decided with respect to the Supreme Court of the United States, created by the Constitution. Attempted application of the 1931 Statute to it would present the same problems as an attempted application to the Superior Court or the Supreme Court of California, whose inherent powers are thus defined:

Brydonjack v. *The State Bar of California*, 208 Cal. 439, 442:

> "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. (In re Garner, 179 Cal. 413 (177 Pac. 162); Nicholl *v.* Koster, 157 Cal. 416 (108 Pac. 302).)"

Millholen v. *Ray L. Riley, Controller, etc.*, 211 Cal. 29, 33:

> "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to re-

> move all obstructions to its successful and convenient operation. This arises from the fact that it is part of and belongs to one of the three independent departments set up by the Constitution, article VI, section 1. This power is recognized, among other places, in sections 47 and 144 of the Code of Civil Procedure. While the above statement is true, there is this qualification thereof, which has been recognized at all times in this state—the legislature may at all times aid the courts and may even regulate their operation so long as their efficiency is not thereby impaired."

These were not contempt cases but they express the doctrine of the decision now under review.

The California Supreme Court has repeatedly said that, although the Legislature may control all procedural aspects of contempt (as shown above), it may not fetter the power itself. The *Nye* decision contains no intimation to the contrary nor any basis for contending that this Court, by adopting a new criterion for constructive contempt, may impose it upon the California courts and pronounce all other standards to be lacking in due process of law.

The Reasonable Tendency Criterion is Not Vague or Indefinite.

Considered As a Statutory Standard.

Considering the sufficiency of this standard independently of its long accepted usage, regard must be had to the settled distinction relating to statutory definitions of offenses against defined activities of the Government, which the court in *Herndon* v. *Lowry*, 301 U. S. 241, 257, quoted with approval from *Gitlow* v. *New York*, 268 U. S. 652, as follows:

> "'. . . when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming

within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

"'It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.' (pp. 670, 671.)"

We have a statutory standard involved in this case, for Sec. 1209 of the California Code of Civil Procedure says:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

* * * * * * *

"8.[9] Any other unlawful interference with the process or proceedings of a court * * *."

This language of itself writes the common law doctrine of reasonable tendency into the statutes of California, but it does not stand alone. See Pol. Code, Sec. 4468 quoted, *supra*.

Thus we have a statutory declaration that publications having an inherent or reasonable tendency to influence or

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[9] Formerly Subd. (9).

otherwise interfere with the proceedings in a pending cause constitute a contempt. Under these circumstances, the *Gitlow* and *Herndon* cases forbid an inquiry into the "question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil", namely, the interference with a court proceeding. If the statutory test be adequate from a constitutional standpoint, the evidence will not be reviewed except for the limited purpose of determining whether, as expressed in the *Milk Wagon Drivers Union* case, the conviction rests upon "insubstantial findings of fact screening reality" (312 U. S. at 293), amounting to "a palpable evasion of the Constitutional guaranty here invoked" (p. 294).

It is folly to say that these statutes do not express the legislative will of California because forsooth Subd. 11 (formerly 13) of Sec. 1209 unconstitutionally sought to immunize contempt by publication unless occurring in the immediate view of the court. This statute has been held unconstitutional ever since 1893 (see *In re Shortridge*, 99 Cal. 526, at 532, and R. 147). The people have effected no change in the Constitution and the Legislature has made no effort to surround the punishment of such contempts by procedural restrictions, such as compulsory jury trial or nominal fine to exclusion of jail sentence. The law of the State is represented by valid enactments and they are found in C. C. P. Sec. 1209, Subd. (8), and Pol. Code, Sec. 4468.

Considered As a Common Law Test.

But if the reasonable tendency criterion be considered independently of the California statutes, it possesses, aside from its ancient lineage, adequate certainty to meet the demands of due process. The phrase "inherent tendency" is, we think, more expressive and definitive, for it connotes those circumstances of time, place and content which determine the presence in a publication (or other interference)

of an internal momentum and direction which will in normal course of events carry it into the judicial deliberations and there disturb, embarrass or otherwise influence the result. This criterion, just like "clear and present danger", is one of proximity and degree, realistic, and not, as opposing counsel suggest, subjective or esoteric.

Herndon v. *Lowry*, 301 U. S. 242, is petitioners' main reliance in their challenge to the intrinsic sufficiency of the reasonable tendency rule. But the case is not opposed to our contentions. Essentially it holds that a statute which, as construed by the State court, does not "deal with a wilful attempt to obstruct a described and defined activity of the government" (p. 256) nor forbid "any specified conduct or utterance of the accused" (p. 261), but leaves it to the jury to create its own standard of guilt, such as "a dangerous tendency", with the object of the tendency undefined except at the whim of the jury—that such a statute furnishes too vague a criterion to convert innocent speech or conduct into a crime. But the case there under consideration was carefully distinguished from those which apply a recognized common law standard as a test of guilt (p. 263), though that standard be one involving a question of degree in its application; and, as above pointed out, that case was also differentiated from those dealing with a statute declaring "that utterances of a certain kind involve such danger of substantive evil that they may be punished", in which event "the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration" (p. 257).

We have heretofore emphasized the fact that the *Herndon* decision recognizes the sufficiency of long recognized common law standards.[10]

In *Nash* v. *United States*, 229 U. S. 373, an indictment under the Sherman Act was challenged on the ground that

[10] Pages 24-26 Bridges first brief; pages 24-26 Times first brief.

the statute was so vague as to be inoperative on its criminal side. The court said in part at pages 376-378:

> "The objection to the criminal operation of the statute is thought to be warranted by The Standard Oil Co. *v.* American Tobacco Co., 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer sitting in the Circuit Court. Tozer *v.* United States, 52 Fed. Rep. 917, 919.
>
> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' Commonwealth *v.* Pierce, 138 Massachusetts, 165, 178. Commonwealth *v.* Chance, 174 Massachusetts, 245, 252. The criterion in such cases is to examine whether common social duty would, under the circumstances, have sug-

gested a more circumspect conduct.' 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See Reg. *v.* Desmond, and other illustrations in Stephen, Dig. Crim. Law, art. 223, 1st ed. p. 146. If he did no more than drive negligently through a street he might get off with manslaughter or less. *Reg.* v. *Swindall*, 2 C. & K. 230; Rex. *v.* Burton, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See The Germanic, 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Reasonable Tendency May Be Made a New Statutory Standard of Guilt.

In *Water-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86, the court had under consideration a state anti-trust law which prohibited combinations for this purpose, among others:

> "1. To create or which may *tend to create* or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State."

The statute also defined "monopoly" to consist of a combination of two or more corporations when effected in either of the following methods:

> "1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control *tends to create* a trust, as above defined.

"2. When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition *tends to affect or lessen competition*, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

The court said at pages 108-111:

"It is further insisted that the acts in question are so vague, indefinite and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law. These objections are found in the *words of the act of 1899, denouncing contracts and arrangements 'reasonably calculated' to fix and regulate the price of commodities, etc. And in the act of 1903 acts are prohibited which 'tend' to accomplish the prohibited results.* It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that a criminal statute should be so definite as to enable those included in its terms to know in advance whether the act is criminal or not. * * *

"And also the case of Louisville & Nashville Railway *v.* Commonwealth, 99 Kentucky, 132, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for under such an act it rests with the jury to say whether a rate is reasonable, and makes guilt depend, not upon standards fixed by law, but upon what a jury might think as to the reason-

ableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

"Take the act of 1903, which denounces acts which 'tend' to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In United States *v.* Knight, 156 U. S. 1, this court said: 'Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition.' This language was quoted with approval in the Addyston Pipe Co. Case, 175 U. S. 237. And in the Northern Securities Case, 193 U. S. 197, while the Sherman Act directly condemned conspiracies and combinations in restraint of trade or monopolizing or attempting to monopolize the same, this court said (page 332):

" 'That to vitiate a combination, such as the act of Congress condemns it need not be shown that the combination in fact results, or will result in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.'

"As to the phrase, 'reasonably calculated', what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished? * * *

"And it is to be remembered that we are dealing with an act of the legislature, sustained in the courts of the State, with reference to its validity in view of the prohibitions of the Federal Constitution against

deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the State, the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

Fox v. *Washington*, 236 U. S. 273. This case involved the constitutionality of a statute of the State of Washington, reading as follows:

"Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a *tendency* to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall *tend* to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

The statute was held to furnish a sufficiently definite criterion of guilt in the particular case, the court saying, at pp. 277-278:

"Thus by indirection but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure, and the jury so found.

"* * * We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restric-

> tion of liberty and too vague for a criminal law must fail. • • •
>
> "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See Nash *v.* United States, 229 U. S. 373. International Harvester Co. *v.* Kentucky, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States."

The result of these cases is this: The court or jury cannot be left to create at the trial its or their own standard of wrongdoing, but a statutory or other definition of crime is not vague for uncertainty "merely because it throws upon men the risk of rightly estimating a matter of degree;" there must be an uncertainty in the standard itself as distinguished from a mere matter of difficulty in applying the standard to the given facts. "'Drawing the line' is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind" (*Harrison* v. *Schaffner*, 312 U. S. at 583).

These principles have recently been reannounced and applied in *Gorin* v. *United States*, 312 U. S. 19. This case involved the Espionage Act of June 15, 1917, and particularly the sufficiency of an indictment under the language of the Act—"connected with the national defense" and "relating to the national defense." The court said at pages 26-27:

"The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced anyone, at his peril, to speculate as to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid. United States *v.* Cohen Grocery Co. urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view. In Lanzetta *v.* New Jersey the statute was equally vague. 'Any person not engaged in any lawful occupation, known to be a member of any gang * * *, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster. * * *' We there said that the statute 'condemns no act or omission;' that the vagueness is such as to violate due process.

"But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. * * * Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation."

In footnotes 12 and 13 on page 27 the contrasting decisions on this subject of vagueness are collated. Having found the statute itself sufficient, the court further held that there was no error in leaving to the jury the question of fact whether the information obtained by defendant was connected with or did relate to the national defense. Uncertainty in the standard may be fatal, but mere difficulty in drawing a line in a question of degree has no such effect.

And so it is with contempt of court and the common law standard of reasonable tendency. It is not open to each judge to prescribe his own criterion of what constitutes contempt; he must be governed by the precedents and determine as a matter of law what are the confines of "reasonable tendency;" having done this, he must then apply that standard to the facts of the particular case and the difficulties of determining matters of degree in the application of a reasonably well defined criterion to given facts does not render the statute itself void for vagueness.

PETITIONERS' ATTEMPTS TO DIFFERENTIATE BETWEEN INHERENT TENDENCY AND CLEAR PRESENT DANGER AS APPLIED TO CONSTRUCTIVE CONTEMPTS HAVE PROVED FUTILE.

We have discussed this matter in the first Bridges brief at pages 19-23; Bridges Supplemental Brief pages 18-25; first Times brief pages 42-48; and Times Supplemental Brief pages 18-27.

Opposing counsel now bring forward alternative suggestions involving, as expressed in the Bridges Brief on Reargument, three different types of publications, *viz:*

> "1. Those which actually obstruct judicial proceedings;
>
> "2. Those which while failing to achieve their purpose were intended to obstruct;
>
> "3. Those which neither obstruct, nor were intended to do so, but which were put out under circumstances such that there was a clear and present danger that obstruction would result" (p. 8).

Suggestion No. 3 is but a reiteration of an oft-repeated phrase and, so far as definition goes, we are still left in the dark. Counsel for neither petitioner do anything better

in the way of differentiating present danger from inherent tendency than to suggest that the former has an accentuated tendency, a greater degree of nearness to success. This would still leave us with a criterion depending upon factual questions of proximity and degree upon which the finding of the State courts would be conclusive except in instances of complete absence of evidence warranting the drawing by reasonable men of the inferences adopted by the trial judge.

The Actual Obstruction Test Has Been Repeatedly Rejected.

Mr. Justice Holmes did so in the *Schenck* case, where the clear and present danger doctrine was first announced. He said at page 52 of 249 U. S.:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

As we have elsewhere shown, this was the definite ruling of *Sinclair* v. *United States*, 279 U. S. 749, and of *Gitlow* v. *New York*, 268 U. S. 652.

The English cases are to the same effect. See *Rex* v. *Tibbits*, L. R. (1902), 1 K. B. 77, 85-89; *Charlton's* Case, 2 My. & Cr. 316, 342, 40 Eng. Rep. 661, 671 (1837); and *Skipworth's* Case, L. R., 9 Q. B. 230, 235-238 (1873).

Oswald on Contempt of Court, citing English cases, says at page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."

Sinclair v. *United States*, 279 U. S. at 764:

> "The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon

the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

In re San Francisco Chronicle, 1 Cal. (2d) 630, at 637:

> "It is also entirely immaterial that the article did not in fact influence the court, so long as the publication tended to obstruct justice. (In re Shuler, supra; In re Lindsley, supra; United States *v.* Toledo Newspaper Co., 220 Fed. 458, affirmed 247 U. S. 402 (38 Sup. Ct. 560, 62 L. ed. 1186); Ray *v.* State, 186 Ind. 396 (114 N. E. 866).) The article necessarily tended to arouse a state of mind in the general public and to influence public opinion, in such a way as to embarrass the court in the determination of the cause. In this respect, it has the same effect as one which directly attempts to arouse sympathy in favor of one side of the case."

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The court in the *San Francisco Chronicle* case quoted with approval from *People* v. *Wilson*, 64 Ill. 195, as follows:

> " 'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.' "

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108 of No. 64:

"If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132 of *Times* case.

Intent Without Success.

In California, as elsewhere, it is well established that intent is not of the essence of a contempt of court; it goes to the magnitude of the offense and is not an indispensable ingredient.

In re San Francisco Chronicle, 1 Cal. (2d) 630, at 635:

"The position of respondents is that their mere statement under oath, that they acted in good faith purges them of the alleged contempt. Similar is their contention that the proceeding is quasi criminal in character, and that the essential element of criminal intent is negatived by their sworn denial. It would indeed be a remarkable rule that in criminal prosecutions the sworn conclusion of the defendant that he meant no wrong would conclusively establish his innocence, *in spite of his frank admission that he knowingly did the act complained of*. There is no such rule in criminal prosecutions, and in proceedings for contempt this view has been repudiated by the great majority of American jurisdictions. The majority rule above referred to is especially applicable when, as here, the publication is not susceptible of two interpretations. (Citing cases.)"

To the same effect, see:

Ex Parte Creely, 8 Cal. App. at 719-20;
In re Independent Pub. Co., 228 Fed. 789.

The court in *Abrams* v. *United States*, 250 U. S. 616, 621, an espionage case, said:

> "It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."

And Mr. Justice Holmes in his dissent said (page 626):

> "I am aware, of course, that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not."

Abstract intent is wholly innocuous and amounts to naught except as translated into action, so this suggested criterion of "intent without successful consummation" automatically identifies itself with the actual obstruction test or the clear and present danger and of its own weight thus drops out of the discussion.

The Charge and the Findings in Each Case.

Bridges Proceedings.

The specific charge is found at R. 4 and the court's finding and conclusions at R. 52.

The California Supreme Court's summarization of the effect of the published portions of the telegram is found at R. 156. At R. 160 emphasis is given to the fact that "it was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty."

Times-Mirror and Hotchkiss Case.

"Sit-Strikers Convicted"—First Count. The charge is set forth at R. 12 in paragraph V; the finding at R. 60 in paragraphs 1 and 4; and the Supreme Court's discussion of this editorial at R. 127-28.

"The Fall of an Ex-Queen"—Third Count. The exact charge appears at R. 18, paragraph V, and the finding at R. 60, paragraph 1; the Supreme Court's appraisal at R. 128-130.

"Probation for Gorillas"—Fifth Count. The charge is set forth at R. 24, paragraph V, and the finding at R. 60, paragraph 1; Supreme Court appraisal at R. 130-134.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE CONVICTION IS NOT OPEN TO REVIEW HERE.

This matter is discussed at pages 50 to 54 of our Bridges supplemental brief and at pages 49-52 of Times Supplemental Brief; we invite renewed attention thereto. And we offer the following additional observations:

The rule of *Aetna Life Ins. Co.* v. *Duncan*, 266 U. S. 389, concerning review of the evidence by this Court was reiterated in *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 143, the court adding:

> "We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier

> of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits."

Mr. Justice Holmes, applying this thought to the review of a State contempt proceeding, said in *Patterson* v. *Colorado*, 205 U. S. at 460:

> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.* Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt*, as well as the time during which it may be committed, *is a matter of local law.*"

And the same thought was expressed in the *Milk Wagon Drivers Union* case, 312 U. S. at 294, as follows:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights."

The evidence is reviewed, however, at pages 55-82 of the Bridges Supplemental Brief, and at pages 12-30 of the first Times brief.

A JUDICIAL CONVICTION OF ABUSE OF A LIBERTY IS NOT THE EQUIVALENT OF A STATUTE FORBIDDING ITS LEGITIMATE EXERCISE.

Petitioner Bridges contends [and petitioner Times-Mirror apparently also contends] that the judgment in an individual case convicting one of an abuse of the right of free speech is on a parity with a statute or ordinance forbidding legitimate exercise of that fundamental right. The argument is manifestly unsound, and this was pointed out by Mr. Justice Hughes in *Near* v. *State of Minnesota*, 283 U. S. 697, 720, when he said:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Mr. Justice Frankfurter in the *Milk Wagon Drivers Union* case (312 U. S. 287, 297), and in *American Federation of Labor* v. *Swing*, (312 U. S. 321) emphasized the difference between previous restraint of lawful speech and court control before or after the event of abuses of that right. In the former case he said:

> "We do not qualify the Thornhill and Carlson decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. Cantwell *v.* Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352; American Federation of Labor *v.* Swing, No. 56 this term, this day decided (— U. S. —, post, 513, 61 S. Ct. —). But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, Thornhill *v.* Ala-

bama, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, supra, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Thornhill opinion excluded from its scope."

This distinction, so plain but so consistently ignored by petitioners, serves to differentiate from the case at bar most of the authorities upon which respective counsel rely. There is nothing in the law of constructive contempt which bears the complexion of previous restraint or subsequent punishment of such a nature as to amount to a practical previous restraint, for it is only those acts or utterances which have a reasonable tendency to interfere with the court proceeding which are ever punishable. It would be as logical to say that the laws punishing for libel, slander, sedition and the like are unlawful restraints of free speech. Yet those laws furnish an ever-present "overhanging and undefined threat" just as much as do the laws of negligence, restraint of trade or constructive contempt of court, for in each instance the violation depends upon a correct judging of matters of proximity and degree by a layman.

DECISIONS RENDERED AT LAST TERM OF THIS COURT POINT UNMISTAKABLY TO AN AFFIRMANCE HEREIN.

The cases decided at the October 1940 term have marked out a clear pathway for a correct solution of this case. The starting point for the discussion is furnished by *Cox* v. *New Hampshire*, 312 U. S. 569, wherein a group of Jehovah's Witnesses, members of the sect whose right to free expression had been upheld in *Cantwell* v. *Connecticut*, 310 U. S. 296, were denied the right to employ an unlicensed parade as the vehicle for expressing their views, although they were ministers of the particular sect, engaged in "an informa-

tion march", carrying signs and placards and handing out printed leaflets announcing a meeting of the Witnesses, and although no breach of the peace occurred or was in fact threatened. At page 574 Mr. Chief Justice Hughes said:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is *designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.* One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is *a traditional exercise of control by local government*, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

We find here not a word about clear and present danger for the court is dealing with one of the long recognized and normal functions of government, exercised immemorially, side by side with fundamental liberties and only indirectly or incidentally in restraint of the same.

The court stressed the fact that the ordinance was not aimed at the restriction of speech or worship and affected same only as an incident to accomplishing some other legitimate governmental purpose, at which point freedom of speech must yield.

It adverted to the State court's construction of the statute and the significance of the facts that "the statute prescribed 'no measures for controlling or suppressing the publication on the highways of facts and opinions, either by speech or by writing;' that communication 'by the distribution of literature or by the display of placards and signs' was in no respect regulated by the statute; that the regulation with respect to parades and processions was applicable only 'to organized formations of persons using the highways;' and that 'the defendants, separately, or collectively in groups not constituting a parade or procession,' were 'under no contemplation of the Act' " (p. 575); and further remarked: "In this light, the court thought that interference with liberty of speech and writing seemed slight" (p. 575); and "It was with this view of the limited objective of the statute that the State court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of time, place and manner so as to conserve the public convenience" (p. 575-6).

The quoted language, coupled with the review of such cases as *Lovell* v. *Griffin, Hague* v. *Committee, etc.* at pages 577-8, discloses that laws which are designed for the protection of the public as a whole, though they cover so relatively unimportant a matter as avoidance of traffic congestion on the public streets, are not invalid merely because they limit incidentally or indirectly the exercise of one of the fundamental liberties; that in those instances where the legislation is not aimed at the restriction of free speech,

freedom of worship or the like, those rights must yield *pro tanto* in the process of balancing "felt necessities" of society against individual rights; but that legislation or court action *directed at* the suppression of lawful exercise of free speech or religion is unlawful unless it can be shown to be necessary in order to prevent "some substantive evil which the State constitutionally may seek to prevent". Again we quote the Cox decision:

> "The statute, as the state court said, is not aimed at any restraint of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited.
>
> "The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions." (p. 578)

As the parade ordinance of the *Cox* case was not directed at free speech or freedom of worship, it was upheld; likewise the flag salute requirement of the State of Pennsylvania which was upheld in *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, and the injunction in the *Milk Drivers* case which was sustained in 312 U. S. 287. In the last mentioned case it was held that, while peaceful picketing cannot be enjoined because it is a form of freedom of expression (*American Federation of Labor* v. *Swing*, 312 U. S. 321), that basic right cannot be made the vehicle for accomplishing admitted wrongs.

When speech takes the form of epithets or personal abuse, it ceases to be in any proper sense a communication of information or opinion safeguarded by the Constitution (*Cantwell* v. *Connecticut*, 310 U. S. at 310), or if it takes the form of defamation, it is subpect to the laws of libel (*Near* v. *Minnesota*, 283 U. S. at 715). When accompanied by explosive

or stench bombs, window breaking, arson and other forms of violence, it ceases to be free speech and becomes a breach of the peace, a wrong whose continuance can be properly prevented by injunction, as held in the *Milk Drivers* case. Free speech as such cannot be suppressed by statute or by court decree. But it must be exercised within its own orbit, subject to the limitations imposed by other laws designed to accomplish permissible ends, whether it be keeping the streets clean and open or the maintenance of the independence of the courts of the land.

Other recognitions of the distinction between direct and incidental restrictions of speech or other fundamental liberties are found in:

Schneider v. *State*, 308 U. S. 147, 160-6;
Carlson v. *California*, 310 U. S. 106, 112;
Cantwell v. *Conn.*, 310 U. S. 296, 304-5, 308-9;
Grosjean v. *American Press Co.*, 297 U. S. 233, 250;
Associated Press v. *Natl. Labor Rel. Bd.*, 301 U. S. 103.

In no instance has the standard of guilt been invalidated as unconstitutional because of its restriction of the basic liberties where that standard constituted a part of a law of general application and operated only incidentally to hold the exercise of the right of speech, religion, assembly or petition within those bounds which are implicit in the concept of "ordered liberty".

A review of the recent decisions will disclose that in the main the statutes or ordinances which were invalidated involved express prohibition of free speech or, through an arbitrary licensing system, sought to accomplish the same end. This is true of *Lovell* v. *Griffin*, 303 U. S. 444, a handbill case; *Hague* v. *C.I.O.*, 307 U. S. 496, a public assemblage controversy; *Schneider* v. *Irvington*, 308 U. S. 147, another series of handbill cases; *Thornhill* v. *Alabama*, 310 U. S. 88, an anti-picketing ordinance; *Carlson* v. *California*, 310 U. S.

106, another anti-picketing ordinance; *Cantwell* v. *Connecticut*, 310 U. S. 296, as to Count Three which dealt with a licensing ordinance held to be directly restrictive of freedom of speech and religion.

The characterization of the *Thornhill* and *Carlson* cases in the *Milk Wagon Drivers Union* decision (312 U. S. at 297) applies to all of those which we have just mentioned:

> "They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down."

This also applies to *Stromberg* v. *California*, 283 U. S. 359.

Other instances in which legislation has been stricken are those wherein the prescribed standard of guilt was too vague, namely, *Herndon* v. *Lowry*, 301 U. S. 242; *Lanzetta* v. *New Jersey*, 306 U. S. 451; and *Cantwell* v. *Connecticut*, 310 U. S. 296, as to the Fifth Count of information.

In *De Jonge* v. *Oregon*, 299 U. S. 353, the Syndicalism Statute of that State, though valid on its face, was held to be unconstitutional because of the construction placed upon it by the Supreme Court. This is also true of the *Herndon* case.

On the other hand, direct restrictions upon freedom of speech or religion were upheld because of their relation to the needs of organized society in *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Schenck* v. *United States*, 249 U. S. 47; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 373; *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287.

It seems plain, though the Bill of Rights constitutes a firm defense against direct infringements upon the right of

free speech where those infringements are the sole or major end of the legislation, nevertheless the liberty must yield to the demands of the body politic when legislation directed to other legitimate ends affects these fundamental rights but incidentally.

No Procedural Questions Are Involved in Either Case.

The determination of these causes should not be embarrassed by any considerations of adjective law, such as the controversy over inherency of power to punish summarily for constructive contempt. Indeed, there was nothing resembling summary procedure in either case.

The course of the Bridges litigation through the State courts extended from February 24, 1938, to October 16, 1939, and is described at page 7 of respondent's first Bridges brief. True, there was a denial of jury trial, but no point is now made of that (Petn. p. 9), nor could one be successfully advanced (*Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; see admission in footnote 3 on page 4 of Reply Brief). Perhaps petitioner's attitude is influenced by the fact that Judge Bishop was chosen by stipulation after petitioner had challenged Judge Schmidt (R. 141).

As appears from pages 1-5 of the first Times brief, that cause was initiated on June 3, 1938, and terminated in the California courts on February 29, 1940. No jury trial was demanded; a demurrer was interposed which was argued for seven days; the case was tried on oral evidence; it was argued in the Supreme Court of California, held under submission for approximately a year, and then reargued and decided against petitioner.

In both cases all questions, such as arguments based upon Sir John Fox's criticism of the procedural phases of *Rex* v. *Almon*, have been waived. There cannot be found in either proceeding the slightest vestige of the error of that doctrine as expounded in *Nye* v. *United States*. There are no

questions here except those involving substantive law. Review upon certiorari is confined to the points raised in the petition.[11]

Subd. 13 of Sec. 1209 California Code of Civil Procedure Is Concededly Unconstitutional.

Although counsel in both cases discuss it as if it were the expression of the legislative policy of California, they concede that Subd. 13 of Sec. 1209 C.C.P. has been repeatedly declared unconstitutional, and they also confess that a State court decision declaring a State statute unconstitutional raises no Federal question, as indeed they must. First declared unconstitutional in 1893 (*In re Shortridge*, 99 Cal. 535), the people have effected no change in the Constitution and the Legislature has made no effort to surround the punishment of such contempts by procedural restrictions, such as jury trial, nominal fine to exclusion of jail sentence, etc. Subd. 13 has the same place in California jurisprudence as if it had never been enacted.

Respectfully submitted,

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[11] *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, etc. Co.* v. *National L. Rel. Bd.*, 301 U. S. 142, 146.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 19[illegible]

HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
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ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones REctor 2-5856-7

INDEX.

PAGES

Statement 1

POINT I—The conviction for contempt violated petitioner's rights of freedom of speech and of the press 2

CASES.

Craig v. Hecht, 263 U. S. 255 5

deJonge v. Oregon, 299 U. S. 353 ..... 3 (note)

Erie Railroad Company v. Tompkins, 304 U. S. 64 4

Grosjean v. American Press Co., 297 U. S. 233 ..... 3 (note)

Hague v. C. I. O., 307 U. S. 496 ..... 3 (note)
Herndon v. Lowry, 301 U. S. 342 4

The Leaflet Cases, 308 U. S. —— ..... 3 (note)
Lovell v. Griffin, 303 U. S. 444 ..... 3 (note)

Near v. Minnesota, 283 U. S. 697 ..... 3 (note)
Nixon v. The State, 207 Ind. 426 4

Patterson v. Colorado, 205 U. S. 454 4

Sinclair v. United States, 279 U. S. 749 5
State v. American News Company, 64 So. Dak. 385 4

The Times-Mirror Company v. The Superior Court of the State of California, 98 Cal. Dec. 108, 92 Pac. 2nd 1029 ..... 1, 3
Toledo Newspaper v. United States, 247 U. S. 402 5

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 759.

HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union submits this brief because it believes that the conviction for contempt here sought to be reviewed constitutes a serious threat to the freedom of speech and of the press. We believe that the questions in this case, as well as those in the case of *The Times-Mirror Company* v. *The Superior Court of the State of California*, 98 Cal. Dec. 108, 98 Pac. 2nd, 1029, which, we are informed, will shortly be presented here for review—, merit the fullest consideration by this Court.

The American Civil Liberties Union is an organization devoted to the protection of those rights guaranteed by state and national constitutions which are inherent in a democracy. Basic among such rights are freedom of speech and of the press. The American Civil Liberties Union recognizes, of course, that no rights are absolute, that their exercise may be subject to punishment under certain con-

ditions, and that a person may, in a proper case, be punished for contempt on account of comment on judicial proceedings. But, in determining whether or not a particular publication should be so punished, it must always be borne in mind that freedom of speech and of the press are rights not lightly to be taken away and that a policy of restriction may produce a press servile and subservient with consequences to our freedom that are incalculable. It is only in the clearest cases, therefore, that the Courts should use their power to punish for contempt.

This necessity for judicial self-restraint is all the greater because the Courts are, in contempt proceedings, sitting in judgment on issues affecting themselves. Here are absent those checks and balances so conspicuous in our system of government which permit review of both legislative and executive actions by a different department. In contempt matters, the judiciary constitute a law unto themselves. Excessive sensitiveness to criticism or arrogance of attitude tend far more to bring the judiciary into disrepute than do most of the comments which form the basis of contempt proceedings.

POINT I.

The conviction for contempt violated petitioner's rights of freedom of speech and of the press.

Petitioner has been convicted of contempt of Court for sending to the Secretary of Labor of the United States a telegram which characterized as "outrageous" a decision of a State Court in a controversy between two labor unions (see R. 50, 51). The judge, before whom the contempt proceedings were instituted, held that since an application for a new trial remained undetermined (R. 51), the action was still pending before the judge criticized and, therefore, the sending of the telegram and its subsequent publication were calculated to interfere with the administration of justice (R. 52).

The Supreme Court of the State of California affirmed this judgment in an opinion (R. 136-161) from which Judge Edmonds dissented (R. 161-176). The dissent was based upon the ground that the conviction violated petitioner's rights of freedom of speech and of the press. These views were reiterated by Judge Edmonds in his dissent in *The Times-Mirror* case. And in that case he was joined by Judge Gibson, who had not sat in the case at bar. Both of these dissents have been annexed to the petition for writ of certiorari herein.

In *The Times-Mirror* case the contempt proceedings were based on newspaper editorials. Two editorials approved verdicts of guilty in criminal cases; another criticized a law under which it was possible for a defendant found insane upon a charge of manslaughter to be released if found sane as of a later date, one of the editorials expressed the opinion that a judge should not grant an application for probation then pending before him.

We thus see that the California Courts have approved convictions of contempt both where judicial action has been criticized and where it has been approved. In no one of the cases was any act committed in the presence of the judge, nor did any of the judges involved indicate that their freedom of action has been impaired. In the cause at bar the proceeding was instituted by the Executive Secretary of the Los Angeles Bar Association (R. 1).

This Court, having in numerous recent cases,* voided legislation because of its interference with freedom of speech and of the press, it cannot be supposed that similar restrictions should not be applied to judicial acts. Surely, punishments for contempt must be scrutinized as much as legislation to determine whether or not the evil sought to be remedied by the punishment is so direct and serious in character as to justify a curtailment of the great privileges of free speech and press. The words of Mr. Justice Roberts in

*Near v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *deJonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *The Leaflet Cases*, 308 U. S. ——.

Herndon v. *Lowry*, 301 U. S. 342, warning against the punishment of words because of their "dangerous tendency" are as applicable to the action of judges as to that of a legislature.

The Fourteenth Amendment is aimed at all state action, not merely at legislative or executive action alone. That judges are subject to the commands of the Constitution was recently dramatically exemplified in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. There this Court overthrew a century old practice of deciding cases in the Federal courts in disregard of state common law, pointing out that that course of conduct violated the Constitution.

There is no reason why prosecutions for contempt should not be subject to the same constitutional restrictions as govern prosecutions for crime. Indeed there is greater need because of the summary character of contempt proceedings. It should not, therefore, be enough for a Court to reach the conclusion that a criticism of judicial proceedings *might* obstruct justice. Rather should the Court be required to find that there was a reasonable apprehension that the independence of the judiciary was being challenged by the comment complained of. To preserve the nice balance between contending principles, freedom of the press and independence of the judiciary, it should be necessary to find a strong probability that interference would result from the act charged before punishment is meted out. Such a rule has been adopted in *State* v. *American News Company*, 64 So. Dak. 385, and *Nixon* v. *The State*, 207 Ind. 426.

This Court has not had occasion to decide the issues presented in the case at bar. The three decisions relied upon by the Court below (R. 156) do not support its position. The first of these, *Patterson* v. *Colorado*, 205 U. S. 454, was decided prior to the acceptance by this Court of the doctrine, now firmly established, that the federal Constitution protects against state interference with freedom of the press. Besides, Mr. Justice Holmes considered that that freedom primarily protected against attempts at prior restraints, whereas it is now well settled that it protects

equally against unwarranted attempts at subsequent punishment. It is the dissenting opinion of Mr. Justice Harlan in that case which more truly reflects the modern view of this Court than does the majority opinion, though written by Holmes—whose later views, indeed, amount to a repudiation of that earlier opinion.

In *Toledo Newspaper* v. *United States*, 247 U. S. 402, the lower Courts had found that the publication complained of was intended to provoke resistance to an injunction; moreover, the words were vituperative of the judge. Of the constitutional problem Chief Justice White said only that the right of the press was "subject to the restraints which separate right from wrong." That, of course, merely begs the real question.

Even on such a record Justice Holmes and Brandeis dissented. It is true that their dissent rested more on questions of statutory interpretation than on constitutional principles. Nevertheless, Mr. Justice Holmes pointed out that judges were expected to be men of "ordinary firmness of character" and that he could not believe that such a judge could have found anything in what was printed in that case which would have "even a tendency" to prevent his performing his duties. And these words are clearly applicable to the case at bar.

Finally, the California Court cited *Sinclair* v. *United States*, 279 U. S. 749. That case does not involve any issue of free speech. The act there charged was the attempted tampering with a juror. The only question which arose was whether or not the fact that the juror was unconscious of the attempt prevented the act from being a contempt. This Court, finding that the direct purpose was to obstruct the administration of justice, inevitably concluded that it was proper to charge the appellants in that case with contempt. The decision in the *Sinclair* case throws no light on the problem now before this Court.

Of much greater relevance to the problem here presented are the observations of some of the judges in *Craig* v. *Hecht*, 263 U. S. 255. That case was decided on a matter

of procedure but Chief Justice Taft indicated that a punishment for contempt was possible only when the publication "is *intended* and calculated to obstruct and embarrass the Court." And in that case Justices Holmes and Brandeis dissented because they could see no basis for a claim that the letter there involved constituted an obstruction of justice. Those judges were well aware of the need for not impairing the right of the people to comment on the actions of judges except when it is quite clear that the comment has a direct tendency to obstruct.

In contempt cases, therefore, the Courts must weigh in the balance one great social need against another: a free press and a free judiciary. Not lightly should that balance be cast. It will not do to assume that one freedom is superior to the other. The freedom of judges may be restricted if they improperly interfere with the press; the freedom of individuals or of newspapers may be limited if they improperly interfere with the Courts. But the problem cannot be solved by the application of any precise formula of words. Much will depend on the temper of the comment under scrutiny and the setting in which it was uttered. Except in unusual circumstances criticism of a decision should never be punishable as contempt, even if it suggests to the judge what decision the writer would prefer.

CONCLUSION.

It is respectfully submitted that the questions presented in this case are of sufficient importance to justify the granting of the petition for certiorari.

Respectfully submitted.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
of Counsel.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1939.

No. ~~759~~. 1 3

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

MEMORANDUM. AMICUS CURIAE. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HARRY GRAHAM BALTER,
639 South Spring Street, Los Angeles,
For the National Lawyers Guild, Los Angeles Chapter,
Amicus Curiae.

CAREY McWILLIAMS,
ELLIS E. PATTERSON,
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Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

A.

The interests of the National Lawyers Guild, Los Angeles Chapter 1

B.

The petition for a writ of certiorari should be granted 4

1. There is an immediate need for clarification as to what test or tests the Supreme Court deems it proper to apply to the powers of a court to punish for contempt by publication 4

2. The case at bar and the companion case of the Los Angeles "Times" have crystalized the broad constitutional questions involved and have focused public concern on the apparent or real conflict between the right of the judiciary to maintain its dignity and independence and the correlative right of the individual and of the press in a free nation to comment of pending issues of public concern 5

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Herndon v. Lowrey, 301 U. S. 342 4

Toledo Newspaper Co. v. United States, 247 U. S. 242 4

PUBLICATIONS.

XXVI American Bar Association Journal, 118, February, 1940 2

XXVI American Bar Association Journal, 143, February, 1940, "Contempt by Publication" 5

XIV California State Bar Journal, 377, December, 1939, "Right of Judiciary to Punish Contempt by Publication Upheld by Supreme Court" 5

Journalism Quarterly, March, 1939, p. 1 5

14 Notre Dame Lawyer, No. 3, p. 258 5

Yale Law Journal, November, 1938, p. 57 5

IN THE

Supreme Court of the United States

October Term, 1939.
No. 759.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

MEMORANDUM, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

The National Lawyers Guild, Los Angeles Chapter, respectfully alleges:

A.

The Interests of the National Lawyers Guild, Los Angeles Chapter.

The National Lawyers Guild is a nation-wide association of liberal and progressive-minded lawyers, numbering in excess of five thousand members. There are chapters in the nation's principal cities. The Los Angeles Chapter

is a regularly constituted Chapter of the National Lawyers Guild, numbering in excess of one hundred active members of the State Bar of California.

The National Lawyers Guild has since its inception devoted itself to the cause of civil liberties and the related rights of freedom of speech, freedom of press and freedom of assembly. In fact, the preservation and extension of these fundamental constitutional rights is one of the pillars of the program of the National Lawyers Guild. (From the Preamble, adopted February 22, 1937:

> ". . . This organization aims to bring together all lawyers . . . who recognize the importance . . . of maintaining our civil rights and liberties and our democratic institutions, and who look upon the law as a living and flexible instrument which must be adapted to the needs of the people."

A committee on Civil Rights and Liberties was one of the original standing committees provided for by the By-Laws.)

The militant and effective work of the National Lawyers Guild in this field has done much to prod the conservative and cautious American Bar Association into creating its own capable and active Committee on Bill of Rights. (For current developments in the work of this committee, see XXVI American Bar Association Journal. 118, February, 1940.)

The interests of the Los Angeles Chapter of the National Lawyers Guild in the case at bar has no relation

whatever to the economic or social views of the petitioner, Harry Bridges, or to his importance, *vel non*, as a leader in the ranks of labor. Its interest is solely based on its deep conviction that an important issue of freedom of speech is involved.

In fact, it is the intent of the Los Angeles Chapter of the National Lawyers Guild to file a Memorandum *Amicus Curiae* in Support of a Petition for Certiorari in the case of the Los Angeles "Times" v. The State of California, which is in a real sense a companion case. The "Times" is notorious for its conservative political and economic views, and its militant opposition to the views of Harry Bridges.

In any event, the Los Angeles Chapter of the National Lawyers Guild wants this Court to know that the Los Angeles Bar Association, which, through its Judiciary Independence Committee, acted as prosecutor both of the petitioner, and of the Los Angeles "Times" acted *not* for for the entire bar of Los Angeles. The Guild is in stout disaccord with both prosecutions. It publicly and vigorously protested both prosecutions. It is of the earnest conviction that the constitutional right of freedom of speech and freedom of the press of both the petitioner and of the Los Angeles "Times" have been abridged. We share wholeheartedly the dissenting views of Justices Gibson and Edmonds in the court below.

B.

The Petition for a Writ of Certiorari Should Be Granted.

1. THERE IS AN IMMEDIATE NEED FOR CLARIFICATION AS TO WHAT TEST OR TESTS THE SUPREME COURT DEEMS IT PROPER TO APPLY TO THE POWERS OF A COURT TO PUNISH FOR CONTEMPT BY PUBLICATION.

A close reading of the majority and dissenting opinions in both the *Bridges* and the *"Times"* cases makes crystal-clear the essential conflict of views.* It is not a sufficient reply to say that this Court has settled the question. In fact the contrary would seem to be the present status in light of this Court's decision in *Herndon v. Lowrey* (301 U. S. 342), where it would seem this Court enunciated the test contended for by both the petitioner, Harry Bridges, and the Los Angeles "Times" in the cases below. Yet, this Court's earlier decision in *Toledo Newspaper Co. v. United States* (247 U. S. 242) will remain the yardstick for such State and inferior Federal tribunals which prefer to apply the more drastic view of what constitutes contempt by publication enunciated by that decision, as is clearly shown by the prevailing opinions in the case at bar and in the case of the Los Angeles "Times." The need for harmonizing these conflicting views seems patent and urgent.

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*The decision of the Supreme Court of California in the *Bridges* case appears at R. 177; the *Times* case is reported in 99 Cal. Dec. 108.

2. THE CASE AT BAR AND THE COMPANION CASE OF THE LOS ANGELES "TIMES" HAVE CRYSTALIZED THE BROAD CONSTITUTIONAL QUESTIONS INVOLVED AND HAVE FOCUSED PUBLIC CONCERN ON THE APPARENT OR REAL CONFLICT BETWEEN THE RIGHT OF THE JUDICIARY TO MAINTAIN ITS DIGNITY AND INDEPENDENCE AND THE CORRELATIVE RIGHT OF THE INDIVIDUAL AND OF THE PRESS IN A FREE NATION TO COMMENT OF PENDING ISSUES OF PUBLIC CONCERN.

The question of freedom of speech and freedom of the press and the encroachment thereon by the exercise of the judiciary's power to punish for contempt by publication has become a matter of widespread and national public concern. See, for example:

"Right of Judiciary to Punish Contempt by Publication Upheld by Supreme Court"—XIV California State Bar Journal, 377, December, 1939;

"Contempt by Publication"—XXVI American Bar Association Journal, 143, February, 1940;

"Journalism Quarterly"—issue of March, 1939, page 1;

"Yale Law Journal"—November, 1938, page 57;

14 *Notre Dame Lawyer*, No. 3, page 258.

The press dispatches under dates of March 10th and 11th, 1940, disclosing involvement of St. Louis *Post-Dispatch* in contempt proceedings for commenting on a dismissal of pending criminal action.

While we are happily not at war, we are rapidly approaching a state of near-hysteria. Particularly at such a juncture, the protection of civil rights, of freedom of speech and of freedom of the press becomes a sacred and honored duty of this Court. The case at bar presents a basic issue on which it is extremely timely for this Court to announce its stand. A clear position now enunciated will avoid the confusion and uncertainty which characterizes the present status of the law of contempt by publication.

Respectfully submitted,

HARRY GRAHAM BALTER,
For the National Lawyers Guild, Los Angeles Chapter, Amicus Curiae.

CAREY MCWILLIAMS,
ELLIS E. PATTERSON,
GEORGE BOLLE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 19.

HARRY BRIDGES,
Petitioner,
against
STATE OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
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INDEX.

PAGES

Statement 1

POINT I—The conviction for contempt violated petitioner's rights of freedom of speech and of the press 2

CASES.

Cantwell v. Connecticut, 310 U. S. 296 ..... 3n, 4
Carlson v. California, 310 U. S. 106 ..... 3n
Craig v. Hecht, 263 U. S. 255 6
deJonge v. Oregon, 299 U. S. 353 ..... 3n
Erie Railroad Company v. Tompkins, 304 U. S. 64 4
Grosjean v. American Press Co., 297 U. S. 233 ..... 3n
Hague v. C. I. O., 307 U. S. 496 ..... 3n
Herndon v. Lowry, 301 U. S. 242 4
The Leaflet Cases, 308 U. S. 147 ..... 3n
Lovell v. Griffin, 303 U. S. 444 ..... 3n
Minersville School District v. Gobitis, 310 U. S. 4
Near v. Minnesota, 283 U. S. 697 ..... 3n
Nixon v. The State, 207 Ind. 426 5
Patterson v. Colorado, 205 U. S. 454 5
Shuler, In re, 210 Calif. 337 4
Sinclair v. United States, 279 U. S. 749 6
State v. American News Company, 64 So. Dak. 385 5
Thornhill v. Alabama, 310 U. S. 88 ..... 3n
The Times-Mirror Company v. The Superior Court of the State of California, 99 Cal. Dec. 108, 98 Pac. 2nd 1029 ..... 1, 3
Toledo Newspaper Co. v. United States, 247 U. S. 402 5

STATUTES.

Cal. Code Civ. Proc., §1209 4

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 19.

HARRY BRIDGES,
Petitioner,
against
STATE OF CALIFORNIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union submits this brief because it believes that the conviction for contempt here under review constitutes a serious threat to the freedom of speech and of the press, as does the conviction in *The Times-Mirror Company* v. *The Superior Court of the State of California*, No. 64, in which we are also filing a brief.

The American Civil Liberties Union is an organization devoted to the protection of those rights guaranteed by state and national constitutions which are inherent in a democracy. Basic among such rights are freedom of speech and of the press. The American Civil Liberties Union recognizes, of course, that no rights are absolute, that the exercise of all rights is subject to punishment under certain conditions, and that a person may, in a proper case,

be punished for contempt by reason of comment on judicial proceedings. But, in determining whether or not particular comment should be so punished, it must always be borne in mind that freedom of speech and of the press are rights not lightly to be taken away and that a policy of restriction may produce a press servile and subservient with consequences to our freedom that are incalculable. It is only in the clearest cases, therefore, that the Courts should use their power to punish for contempt.

This necessity for judicial self-restraint is all the greater because the Courts are, in contempt proceedings, sitting in judgment on issues affecting themselves. Here are absent those checks and balances so conspicuous in our system of government which permit review of both legislative and executive actions by a different department. In contempt proceedings, the judiciary constitute a law unto themselves. Excessive sensitiveness to criticism or arrogance of attitude tend far more to bring the judiciary into disrepute than do most of the comments which form the basis of contempt proceedings.

POINT I.

The conviction for contempt violated petitioner's rights of freedom of speech and of the press.

Petitioner has been convicted of contempt of Court for sending to the Secretary of Labor of the United States a telegram (R. 27) which characterized as "outrageous" a decision of a State Court in a controversy between two labor unions (see R. 50, 51). The judge, before whom the contempt proceedings were instituted, held that since an application for a new trial remained undetermined (R. 51), the action was still pending before the judge criticized and, therefore, the sending of the telegram and its subsequent publication were "calculated" to interfere with the administration of justice (R. 52).

The Supreme Court of the State of California affirmed this judgment in an opinion (R. 136-161) from which Judge Edmonds dissented (R. 161-176). The dissent was based upon the ground that the conviction violated petitioner's rights of freedom of speech and of the press. These views were reiterated by Judge Edmonds in his dissent in *The Times-Mirror* case. And in that case he was joined by Judge Gibson, who had not sat in the case at bar.

In *The Times-Mirror* case the contempt proceedings were based on newspaper editorials. Two of the editorials found to be contemptuous approved verdicts of guilty in criminal cases; the third expressed the opinion that a judge should not grant an application for probation then pending before him.

We thus see that the California Courts have approved convictions of contempt both where judicial action has been criticized and where it has been approved. In no one of the cases was any act committed in the presence of the judge, nor did any of the judges involved indicate that their freedom of action had been impaired. In both cases the proceedings were instituted by the Executive Secretary of the Los Angeles Bar Association.

This Court, having in numerous recent cases,* voided legislation because of its interference with freedom of speech and of the press, it cannot be supposed that similar restrictions should not be applied to judicial acts. Surely, punishments for contempt must be scrutinized as much as legislation to determine whether or not the evil sought to be remedied by the punishment is so direct and serious in character as to justify a curtailment of the great privileges of free speech and press. The words of Mr. Justice Rob-

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*Near v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *deJonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *The Leaflet Cases*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *Connecticut*, 310 U. S. 296.

erts in *Herndon* v. *Lowry*, 301 U. S. 242, warning against the punishment of words because of their "dangerous tendency" are as applicable to the action of judges as to that of a legislature.

That judges are subject to the commands of the Constitution was recently dramatically exemplified in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. There this Court overthrew a century old practice of deciding cases in the Federal courts in disregard of state common law, pointing out that that course of conduct violated the Constitution.

The Fourteenth Amendment is aimed at all state action, not merely at legislative or executive action alone.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court reversed a conviction for crime on the ground that the state court's view of the applicable law violated religious freedom, the judgment of the state court "having been based on a common law concept"—as in the case at bar the view of the California court with regard to what constitutes contempt rests on general common law principles. Here is no explicit declaration of legislative policy such as lead this Court in *Minersville School District* v. *Gobitis*, 310 U. S. , to withhold its protection. There is even more than the absence of such a declaration, which absence weighed so heavily with the Court in the *Cantwell* case. For the California Supreme Court in this case has applied its own ideas of appropriate policy in disregard of a statutory restriction upon its powers (California Code of Civil Procedure, Sec. 1209)—the restriction having many years ago been held unconstitutional as in derogation of the supposed inherent power of courts to punish for contempt (*In re Shuler*, 210 Calif. 337). While, of course, this Court cannot enter into that phase of the controversy, it is appropriate and fitting for this Court to remind the California courts that beyond their conceptions of the inherent power of state courts lies the Constitution of the United States with its provisions guaranteeing freedom of speech and of the press against state action, by judges as well as by other agencies of government.

There is no reason why prosecutions for contempt should not be subject to the same constitutional restrictions as govern prosecutions for crime. Indeed there is greater need because of the summary character of contempt proceedings. It should not, therefore, be enough for a Court to reach the conclusion that a criticism of judicial proceedings *might* obstruct justice. Rather should the Court be required to find that, as said in the *Cantwell* case, there was a "clear and present danger" that the independence of the judiciary would be interfered with by the comment complained of. To preserve the nice balance between contending principles, freedom of the press and independence of the judiciary, it should be necessary to find a strong and imminent probability that interference would result from the act charged before punishment is meted out. Such a rule has been adopted in *State* v. *American News Company*, 64 So. Dak. 385, and *Nixon* v. *The State*, 207 Ind. 426.

This Court has not had occasion to decide the precise issue presented in the case at bar. The three decisions relied upon by the Court below (R. 156) do not support its position. The first of these, *Patterson* v. *Colorado*, 205 U. S. 454, was decided prior to the acceptance by this Court of the doctrine, now firmly established, that the federal Constitution protects against state interference with freedom of the press. Besides, Mr. Justice Holmes considered that that freedom primarily protected against attempts at prior restraints, whereas it is now well settled that it protects equally against unwarranted attempts at subsequent punishment. It is the dissenting opinion of Mr. Justice Harlan in that case which more truly reflects the modern view of this Court than does the majority opinion, though written by Holmes—whose later views, indeed, amount to a repudiation of that earlier opinion.

In *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, the lower Courts had found that the publication complained of was intended to provoke resistance to an injunction; moreover, the words were vituperative of the judge. Of

the constitutional problem Chief Justice White said only that the right of the press was "subject to the restraints which separate right from wrong." That, of course, merely begs the real question.

Even on such a record Justices Holmes and Brandeis dissented. It is true that their dissent rested more on questions of statutory interpretation than on constitutional principles. Nevertheless, Mr. Justice Holmes pointed out that judges were expected to be men of "ordinary firmness of character" and that he could not believe that such a judge could have found anything in what was printed in that case which would have "even a tendency" to prevent his performing his duties. And these words are clearly applicable to the case at bar.

Finally, the California Court cited *Sinclair* v. *United States*, 279 U. S. 749. That case does not involve any issue of free speech. The act there charged was the attempted tampering with a juror. The only question which arose was whether or not the fact that the juror was unconscious of the attempt prevented the act from being a contempt. This Court, finding that the direct purpose was to obstruct the administration of justice, inevitably concluded that it was proper to charge the appellants in that case with contempt. The decision in the *Sinclair* case throws no light on the problem now before this Court.

Of much greater relevance to the problem here presented are the observations of some of the judges in *Craig* v. *Hecht*, 263 U. S. 255. That case was decided on a matter of procedure but Chief Justice Taft indicated that a punishment for contempt was possible only when the publication "is *intended* and calculated to obstruct and embarrass the Court." And in that case Justices Holmes and Brandeis dissented because they could see no basis for a claim that the letter there involved constituted an obstruction of justice. Those judges were well aware of the need for not impairing the right of the people to comment on the actions of judges except when it is quite clear that the comment has a direct tendency to obstruct.

In contempt cases, therefore, the Courts must weigh in the balance one great social need against another: a free press and a free judiciary. Not lightly should that balance be cast. It will not do to assume that one freedom is superior to the other. The freedom of judges may be restricted if they improperly interfere with the press; the freedom of individuals or of newspapers may be limited if they improperly interfere with the Courts; or if their statements have a clear and imminent danger so to do. But the problem cannot be solved by the application of any precise formula of words. Much will depend on the temper of the comment under scrutiny and the setting in which it was uttered. Except in unusual circumstances criticism of a decision should never be punishable as contempt, even if it suggests to the judge what decision the writer would prefer. Such must be the rule if judicial authority is to be reconciled with freedom of the press.

Judged by the principles above laid down, it is submitted that the telegram complained of may not constitutionally be punished as a contempt of Court. The telegram is found in the affidavit of complaint (R. 27) and again in the judgment of the Court (R. 51). The telegram was sent after a trial in an action which involved a dispute between two unions. The Trial Judge, three days before the issuance of a telegram (R. 25), had made findings of fact and conclusions of law (R. 10-25) and awarded judgment to the plaintiffs, had appointed a receiver of the defendant corporation and made permanent a preliminary injunction. Because of the fact that the defendant union had an agreement with various waterfront employers (see R. 36) and it was believed that the decision of the Court would disrupt labor relations then existing, complaint was made to the Secretary of Labor and other government agencies in the interests of industrial peace (R. 109-119).

The purpose of the telegram to Secretary Perkins was not to produce a change of decision from the Trial Judge (and the Court so found, R. 47), but to point out to the Secretary of Labor the seriousness of the situation which would result if the plaintiffs in that action sought to take ad-

vantage of the decision rendered. Whether a particular faction has obtained an advantage over another faction through agreement with the employer or through judicial decision, it would still be the function of the Secretary of Labor through her various agencies of mediation and conciliation to endeavor to prevent that advantage from being so exercised as to result in industrial conflict. Surely one faction has the right to appeal to governmental authority in order to avoid such consequences, particularly when that faction, as here, claims to represent the overwhelming majority of the employees involved. And in characterizing the decision as "outrageous" reference was made in the telegram itself to the fact that defendant had 2,000 members, whereas the plaintiff had only 15 in the particular locality involved. Also, reference was made to the fact that an appeal had been made to the National Labor Relations Board for the certification of the defendant as the exclusive bargaining agent.

And the right to communicate such an appeal to the appropriate federal agencies carries with it the constitutional right to make that plea public in the press.

There is nothing to justify the belief that the request by Bridges for intervention by the Secretary of Labor in what threatened to become a serious industrial dispute was intended to have any effect whatever upon the action of the Court or that it would have such effect. There was, therefore, no clear or present danger that the independence of the judiciary would be interfered with. Consequently there was no contempt.

CONCLUSION.

It is respectfully submitted that the judgment under review should be reversed.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
of Counsel.

Frankfurter J. pp. 5-6

SUPREME COURT OF THE UNITED STATES.

Nos. 1, 3.—October Term, 1941.

Harry Bridges, Petitioner,
1 *vs.*
State of California.

The Times-Mirror Company and L. D. Hotchkiss, Petitioners,
3 *vs.*
The Superior Court of the State of California, in and for the County of Los Angeles.

On Writs of Certiorari to the Supreme Court of the State of California.

[December 8, 1941.]

Mr. Justice Black delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press, but the Superior Court overruled this contention, and the Supreme Court affirmed.[1] The importance of the constitutional question prompted us to grant certiorari. 309 U. S. 649; 310 U. S. 623.

In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all

[1] Bridges *v.* Superior Court, 14 Cal. 2d 464; The Times-Mirror Co. *v.* Superior Court, 15 Cal. 2d 99. In the Times-Mirror case, the affidavits of complaint contained seven counts, each based upon the publication of a different editorial. The Superior Court for Los Angeles County sustained a demurrer to two of the counts, and of the five remaining counts on which conviction rested, the California Supreme Court affirmed as to three, reversed as to two.

respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the court room if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the punishments here imposed were an appropriate exercise of the state's power; in so far as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.[2]

If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them. But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however, solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law "abridging the freedom of speech or of the press" forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one.

I

It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which

[2] See The Times-Mirror Co. *v.* Superior Court, *supra*, 118, where the following is quoted with approval: "Liberty of the press is subordinate to the independence of the judiciary. . . ."

comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308, such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." *Id.* 308. Cf. *Herndon* v. *Lowry*, 301 U. S. 242, 261-264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger[3] sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original question" that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." *Gitlow* v. *New York*, 268 U. S. 652, 671.

How much "likelihood" is another question, "a question of proximity and degree"[4] that cannot be completely captured in a formula. In *Schenck* v. *United States*, however, this Court said that there must be a determination of whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his dissent in *Whitney* v. *California*, 274 U. S. 357, 374: "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."

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[3] Indeed, the only evidence we have of the California legislature's appraisal indicates approval of a policy directly contrary to that here followed by the California courts. For Section 1209, subsection 13, of the California Code of Civil Procedure (1937 ed.) provides: " . . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute.

[4] Schenck v. United States, 249 U. S. 47, 52.

Nevertheless, the "clear and present danger" language[5] of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck* v. *United States, supra; Abrams* v. *United States,* 250 U. S. 616; under a criminal syndicalism act, *Whitney* v. *California, supra;* under an "anti-insurrection" act, *Herndon* v. *Lowry, supra;* and for breach of the peace at common law, *Cantwell* v. *Connecticut, supra.* And very recently we have also suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is "destruction of life or property, or invasion of the right of privacy." *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial", Brandeis, J., concurring in *Whitney* v. *California, supra,* 374; it must be "serious", *id.* 376. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State,* 308 U. S. 141, 161.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compul-

[5] Restatement of the phrase "clear and present danger" in other terms has been infrequent. Compare, however: " . . . the test to be applied . . . *is not the remote or possible effect.*" Brandeis, J., dissenting in Schaefer v. United States, 251 U. S. 466, 486; " . . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*" Holmes, J., dissenting in Abrams v. United States, 250 U. S. 616, 630; "To justify suppression of free speech *there must be reasonable ground to fear that serious evil will result* if free speech is practiced. *There must be reasonable ground to believe that the danger apprehended is imminent.*" Brandeis, J., concurring in Whitney v. California, 274 U. S. 357, 376. The italics are ours.

sion of the Bill of Rights. For the First Amendment[6] does not speak equivocally. It prohibits "any law abridging the freedom of speech or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

II

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the publications here in question belong to a special category marked off by history, a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. Fox, *Contempt of Court*, *passim*, *e.g.*, 207. See also Stansbury, *Trial of James H. Peck*, 430. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press."[7] Schofield, *Freedom of the Press in the United States*. 9 Publications Amer. Sociol. Soc., 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: "Although I

[6] "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." Schneider v. State, 308 U. S. 147, 160.

[7] Compare James Buchanan, quoted in Stansbury, Trial of James H. Peck, 434: "At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy."

know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States." VI Writings of James Madison 1790-1802, 387.

There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath[8] or the restrictions upon assembly[9] then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well.[10] Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no

[8] 16 Geo. II, c. 30. This was not repealed until 1828. 9 Geo. IV, c. 17.

[9] 1 Geo. I, stat. 2, c. 5. Cf. also 36 Geo. III, c. 8, and discussion in Buckle, History of Civilization in England, Vol. I, 351.

[10] Compare VI Writings of James Madison, 1790-1802, 389: "To these observations one fact will be added, which demonstrates that the common law cannot be admitted as the *universal* expositor of American terms, . . . The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States." See also Near *v.* Minnesota, 283 U. S. 697, 716-717; Thornhill *v.* Alabama, *supra*, 102.

more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the court room by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. See *Anderson* v. *Dunn*, 6 Wheat. 204, 227. But attempts to expand it in the post-Ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically[11] forbidding summary punishment for publications. See Nelles and King, *Contempt by Publication*, 28 Col. L. Rev. 401, 409-422.

In the federal courts, there was the celebrated case of Judge Peck, recently referred to by this Court in *Nye* v. *United States*, 313 U. S. 33, 45. The impeachment proceedings against him, it should be noted, and the strong feelings they engendered, were set in motion by his summary punishment of a lawyer for publishing comment on a case which was on appeal at the time of publication and which raised the identical issue of several other cases then pending before him. Here again legislation was the outcome, Congress proclaiming in a statute expressly captioned "An Act *declaratory* of the law concerning contempts of court,"[12] that the power of federal courts to inflict summary punishment for contempt "shall not be construed to extend to any cases except the misbehaviour of . . . persons in the presence of said courts, or so near thereto as to obstruct the administration of justice . . . ." When recently called upon to interpret this statute, we overruled the earlier decision of this Court in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, in the belief that it improperly

[11] The New York statute specifically made "the publication of a false, or grossly inaccurate report" of court proceedings punishable by contempt proceedings, however. New York Rev. Stat. 1829, Part III, c. III, tit. 2, art. 1, § 10(6). The Pennsylvania statute contained no such proviso. It explicitly stated that "all publications out of court . . . concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same." Pa. Acts 1808-1809, c. 78, p. 146.

[12] 4 Stat. 487 (1831).

enlarged the stated area of summary punishment. *Nye* v. *United States, supra.* Here, as in the *Nye* case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

We are aware that although some states have by statute or decision expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power. (See Nelles and King, *loc. cit. supra*, 536-562, for a collection and discussion of state cases.) But state power in this field was not tested in this Court for more than a century.[13] Not until 1925, with the decision in *Gitlow* v. *New York, supra*, did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press.

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.

III

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public

[13] Patterson v. Colorado, 205 U. S. 454, the only case before this Court during that period in which a state court's power to punish out-of-court publications by contempt was in issue, cannot be taken as a decision squarely on this point. Cf.: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First." *Id.* 462.

interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a "reasonable tendency" to obstruct justice in a pending case.

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.[14]

[14] Compare Nelles and King, *loc. cit. supra*, 549: "While the Sacco-Vanzetti case was in the courts [six years], it was not, we believe, suggested as desirable that public expression on either side be dealt with as

For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below.[15] It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste,[16] on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is neces-

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contempts." In public utility rate regulation, to take one of many examples that might be given of a field in which public interest is strong and public opinion divided, cases commonly remain "pending" for several years. See St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38, 88-92; McCart *v.* Indianapolis Water Co., 302 U. S. 419, 435.

15 Cf.: " . . . said telegram . . . had an inherent tendency . . . *to embarrass and influence the actions and decisions of the judge* before whom said action was pending." Bridges *v.* Superior Court, *supra*, 471; "The published statement was not only *a criticism of the decision of the court* in an action then pending before said court, but was *a threat* that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up." *Id.* 488; " . . . the test . . . is whether it had a reasonable tendency *to interfere with the orderly administration of justice* . . . ." The Times-Mirror Co. *v.* Superior Court, *supra*, 103-104; " . . . the editorial [had] . . . a reasonable tendency *to interfere with* the ordinary administration of justice." *Id.* 110. The italics are ours.

16 Compare the following statements from letters of Thomas Jefferson as set out in Padover, Democracy, 150-151: "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.

It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost."

sary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing editor were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined $100. The company alone was held responsible for the other two, and was fined $100 more on account of one, and $300 more on account of the other.

The $300 fine presumably marks the most sericus offense. The editorial thus distinguished was entitled "Probation for Gorillas?". After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting nonunion truck drivers, it closes with the observation: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."[17] Judge Scott had pre-

[17] The whole editorial, published in The Los Angeles Times of May 5, 1938, was as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

viously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence.

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case.[18] To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise. Cf. Holmes, J., dissenting in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 424.

The other two editorials publication of which was fined below are set out in the lower margin.[19] With respect to these two edi-

[18] Cf. The Times-Mirror Co. v. Superior Court, *supra*, 109-110: "The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times." Although the foregoing statement was made with respect to another of the editorials, the opinion of the California Supreme Court later said it was applicable to "Probation for Gorillas?". *Id.* 114-115.

[19] The first of these editorials, entitled "Sit-Strikers Convicted", was published in the Los Angeles Times of December 21, 1937, the day after the jury had returned a verdict that the "sit-strikers" in question were guilty, and the day before the trial judge was to hold court for the purpose of pronouncing

torials, there is no divergence of conclusions among the members of this Court. We are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible, and that the Constitution compels us to set aside the convictions as unpermissible exercises of the state's power. In view of the foregoing discussion of "Probation for Gorillas?", analysis of these editorials and their setting is deemed unnecessary.

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an A. F. of L.

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sentence, hearing motions for a new trial, and passing upon applications for probation. The editorial follows in its entirety:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist. Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

"The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

"Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The second of these editorials, entitled "The Fall of an Ex-Queen", was published in The Los Angeles Times of April 14, 1938. Here, too, publication took place after a jury had found the subject of the editorial guilty, but before the trial judge had pronounced sentence. The editorial follows in its entirety:

"Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss

union and a C. I. O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C. I. O. union, representing some twelve thousand members, did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."[20]

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type, it is apt to be pretty sordid as well. Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

[20] The portions of the telegram published in newspapers of general circulation in San Francisco and Los Angeles on January 24 and 25, 1938, were as follows:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending; Attempted

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be, if a strike was threatened or possible the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States government, a right protected by the First Amendment.[21]

It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed below are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's

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enforcement of Schmidt decision will tie-up port of Los Angeles and involve entire Pacific Coast. International Longshoremen Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

[21] See Bridges *v.* Superior Court, *supra*, 493. *Cf.* White *v.* Nicholls, 3 How. 266.

decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." *Toledo Newspaper Co.* v. *United States, supra,* 425.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 1, 3.—October Term, 1941.

1	Harry Bridges, Petitioner, *vs.* State of California.	On Writs of Certiorari to the Supreme Court of the State of California.
3	The Times-Mirror Company and L. D. Hotchkiss, Petitioners, *vs.* The Superior Court of the State of California, in and for the County of Los Angeles.	

[December 8, 1941.]

Mr. Justice Frankfurter, with whom concurred the Chief Justice, Mr. Justice Roberts and Mr. Justice Byrnes, dissenting.

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law—means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution.

Deeming it more important than ever before to enforce civil liberties with a generous outlook, but deeming it no less essential for the assurance of civil liberties that the federal system founded upon the Constitution be maintained, we believe that the careful ambiguities and silences of the majority opinion call for a full exposition of the issues in these cases.

While the immediate question is that of determining the power of the courts of California to deal with attempts to coerce their

judgments in litigation immediately before them, the consequence of the Court's ruling today is a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves. To be sure, the majority do not in so many words hold that trial by newspapers has constitutional sanctity. But the atmosphere of their opinion and several of its phrases mean that or they mean nothing. Certainly, the opinion is devoid of any frank recognition of the right of courts to deal with utterances calculated to intimidate the fair course of justice—a right which hitherto all the states have from time to time seen fit to confer upon their courts and which Congress conferred upon the federal courts in the Judiciary Act of 1789. If all that is decided today is that the majority deem the specific interferences with the administration of justice in California so tenuously related to the right of California to keep its courts free from coercion as to constitute a check upon free speech rather than upon impartial justice, it would be well to say so. Matters that involve so deeply the powers of the states and that put to the test the professions by this Court of self-restraint in nullifying the political powers of state and nation, should not be left clouded.

We are not even vouchsafed reference to the specific provision of the Constitution which renders states powerless to insist upon trial by courts rather than trial by newspapers. So far as the Congress of the United States is concerned, we are referred to the First Amendment. That is specific. But we are here dealing with limitations upon California—with restraints upon the states. To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens, and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corporation. See *Hague* v. *C.I.O.*, 307 U. S. 496, 514, and cases cited. Only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations. Corporations cannot claim for themselves the "liberty" which the Due Process Clause guarantees.

That clause protects only their property. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. The majority opinion is strangely silent in failing to avow the specific constitutional provision upon which its decision rests.

These are not academic debating points or technical niceties. Those who have gone before us have admonished us "that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice. . . . We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." *Twining* v. *New Jersey*, 211 U. S. 78, 106-07.

In a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment," protected against attempted invasion by the States. *Palko* v. *Connecticut*, 302 U. S. 319, 324-25. The channels of inquiry and thought must be kept open to new conquests of reason, however odious their expression may be to the prevailing climate of opinion. But liberty "in each of its phases has its history and connotation". Whether a particular state action violates "the essential attributes of that liberty" must be judged in the light of the liberty that is invoked and the curtailment that is challenged. *Near* v. *Minnesota*, 283 U. S. 697, 708. For "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social

policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process". *Clark* v. *United States*, 289 U. S. 1, 13.

Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. Compare Lincoln's Message to Congress in Special Session, July 4, 1861, 7 Richardson, Messages and Papers of the Presidents, pp. 3221-3232. In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice.

The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, *Moore* v. *Dempsey*, 261 U. S. 86, mental coercion of a defendant, *Chambers* v. *Florida*, 309 U. S. 227, a judicial system which does not provide disinterested judges, *Tumey* v. *Ohio*, 273 U. S. 510, and discriminatory selection of jurors, *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128.

A trial is not a "free trade in ideas", nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market". Compare Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 630. A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedoom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by

which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The rôle of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The need is great that courts be criticized but just as great that they be allowed to do their duty.

The "liberty" secured by the Fourteenth Amendment summarizes the experience of history. And the power exerted by the courts of California is deeply rooted in the system of administering justice evolved by liberty-loving English-speaking peoples. From the earliest days of the English courts, they have encountered obstructions to doing that for which they exist, namely, to administer justice impartially and solely with reference to what comes before them. These interferences were of diverse kinds. But they were all covered by the infelicitous phrase "contempt of court", and the means for dealing with them is historically known as the power of courts to punish for contempt. As is true of many aspects of our legal institutions, the settled doctrines concerning the mode of procedure for exercising the power of contempt became established on dubious historical authority. Exact legal scholarship has controverted much pertaining to the origin of summary proceedings for contempt. See Sir John Fox, The History of Contempt of Court, *passim*. But there is no doubt that since the early eighteenth century, the power to punish for contempt for intrusions into the living process of adjudication has been an unquestioned characteristic of English courts and of the courts of this country.

The judicatures of the English-speaking world, including the courts of the United States and of the forty-eight states, have from time to time recognized and exercised the power now challenged. (For partial lists of cases, see Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525, 554; Sullivan, Contempts by Publication, pp. 185 *et seq.*) A declaratory formulation of the common law was written into the Judiciary Act of 1789 (§ 17, 1 Stat. 73, 83) by Oliver Ellsworth, one of the framers of the Constitution, later to become Chief Justice; the power was early recognized as incidental to the very existence of courts in a succession of opinions in this Court (*United States* v. *Hudson*, 7 Cranch 32; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Kearney*, 7 Wheat. 38); it was expounded and supported by the great Commentaries that so largely influenced the shaping of our law in the late eighteenth and early nineteenth centuries, those of Blackstone, Kent and Story; its historic continuity withstood attack against state action under the Due Process Clause, now again invoked, *Eilenbecker* v. *Plymouth County*, 134 U. S. 31; and see *Ex parte Robin-*

son, 19 Wall. 505; *Ex parte Terry*, 128 U. S. 289; *Savin, Petitioner*, 131 U. S. 267.[1]

As in the exercise of all power, it was abused. Some English judges extended their authority for checking interferences with judicial business actually in hand, to "lay by the heel" those responsible for "scandalizing the court", that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England and has never found lodgment here. But even the technical power of punishing interference with the court's business is susceptible of abuse. As early as 1809, Pennsylvania restricted the power to inflict summary punishment for contempts to a closely defined class of misconduct, and provided the ordinary criminal procedure for other forms of interferences with a pending cause.

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[1] "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others". United States v. Hudson, 7 Cranch 32, 34 (1812).

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

"It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment." Anderson v. Dunn, 6 Wheat. 204, 227-28 (1821).

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Ex parte Robinson, 19 Wall. 505, 510 (1874).

"The act of 1789 did not define what were contempts of the authority of the courts of the United States, in any cause or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation." Savin, Petitioner, 131 U. S. 267, 275-76 (1889).

1808-09 Pa. Acts, c. 78, p. 146.[2] The flagrant case of Judge Peck[3] led Congress to pass the Act of March 2, 1831, 4 Stat. 487, 28 U. S. C. § 385, the scope of which we recently considered. *Nye* v. *United States*, 313 U. S. 33. A number of states copied the federal statute. It would be pedantic to trace the course of legislation and of adjudication on this subject in our half-hundred jurisdictions. Suffice it to say that the hitherto unchallenged power of American states to clothe their courts with authority to punish for contempt was thus summarized only recently by Mr. Chief Justice Hughes in the leading case vindicating the liberty of the press against state action: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." *Near* v. *Minnesota*, 283 U. S. 697, 715.[4]

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[2] For the history leading up to the Pennsylvania legislation, see Respublica v. Oswald, 1 Dall. 319 (1788), particularly note beginning at p. 329; Respublica v. Passmore, 3 Yeates (Pa.) 441; Hamilton, Report of the Trial and Acquittal of Justices of the Supreme Court of Pennsylvania (1805). Cf. Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6616; United States v. Duane, Wall. Sr. 102, Fed. Cas. No. 14997.

[3] The charge against Judge Peck was that he punished counsel for contempt after the final decree of the particular litigation had been rendered and the necessary steps for an appeal had been taken, and after the judge had published his opinion in a newspaper and plaintiff in reply had submitted to the public "a concise statement of some of the principal errors into which your petitioner [the accused counsel] had fallen". Stansbury, Report of the Trial of James H. Peck (1833). In view of their immediate professional responsibility, the eminent lawyers who had charge of the impeachment proceedings against Judge Peck would naturally take the least tolerant view of the power of courts to punish for contempt. Yet all the managers of the House of Representatives (James Buchanan of Pennsylvania, George E. McDuffie of South Carolina, Ambrose Spencer and Henry Storrs of New York, Charles E. Wickliffe of Kentucky) acknowledged the historic power to punish interferences calculated to obstruct the exercise of the judicial function in a pending cause. They did so substantially in the terms now here challenged. *Ibid.*, pp. 91, 291, 293, 382, 400. The following from Mr. Storrs' argument is a fair sample:

"The law of contempts, when confined to the protection of the courts in their proper constitutional action and duties, and to the punishment of every direct or indirect interference with the exercise of their powers and the protection of those who are concerned in them as parties, jurors, witnesses and officers of justice in aid of the administration of their functions, was too well established and too well sustained by principle as well as positive law, to be doubted or disturbed; and, confined to its proper limits, admitted of all reasonable certainty in its definitions of crime. But if extended to the case of general libel, there was no security for personal liberty but the discretion or feeling of a judge." *Ibid.*, p. 400.

[4] It is relevant to add that this expressed the view of Mr. Justice Holmes and Mr. Justice Brandeis whose opinions have had such a powerful influence in pressing the Due Process Clause to the service of freedom of speech and of the press. In two earlier cases of summary punishment for contempt they

It is trifling with great issues to suggest that the question before us is whether eighteenth-century restraints upon the freedom of the press should now be revived. The question is rather whether nineteenth- and twentieth-century American institutions should be abrogated by judicial fiat.

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.[5] Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.[5] "A man cannot be summarily laid by the heels because his words may make public feelings more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against the judge for what he already has done." Mr. Justice Holmes in *Craig* v. *Hecht*, 263 U. S. 255, 281-82. But the Constitution does not bar a state from acting on the theory of our system of justice, that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U. S. 454, 462. The theory of our system of justice as thus stated for the Court by Mr. Justice

strongly dissented because they found that the limits set by the Act of 1831 had been exceeded. Toledo Newspaper Co. v. United States, 247 U. S. 402, and Craig v. Hecht, 263 U. S. 255. But in neither case did they suggest any constitutional difficulty in the exercise of the contempt power arising from the prohibition of the First Amendment.

[5] See the Lincoln Day, 1898, address of Mr. Justice Brewer, *Government by Injunction*, 15 Nat. Corp. Rep. 848, 849: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

Holmes has never been questioned by any member of the Court. It was questioned neither by Mr. Justice Harlan nor by Mr. Justice Brewer in their dissents in the *Patterson* case. The differences in that case concerned the question whether "there is to be found in the Fourteenth Amendment a prohibition similar to that in the First", and, if so, what the scope of that protection is. The first question was settled in the affirmative by a series of cases beginning with *Gitlow* v. *New York*, 268 U. S. 652. And that the scope of the First Amendment was broader than was intimated in the opinion in the *Patterson* case, was later recognized by Mr. Justice Holmes, speaking for the Court, in *Schenck* v. *United States*, 249 U. S. 47. But that the conventional power to punish for contempt is not a censorship in advance but a punishment for past conduct and, as such, like prosecution for a criminal libel, is not offensive either to the First or to the Fourteenth Amendments, has never been doubted throughout this Court's history.

This conception of justice, the product of a long and arduous effort in the history of freedom, is one of the greatest achievements of civilization, and is not less to be cherished at a time when it is repudiated and derided by powerful régimes. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, 148. This has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures. Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste. Winds of doctrine should freely blow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered.

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. See Laski, Procedure for Constructive Contempt in England, 41 Harv. L. Rev. 1031, 1034; Goodhart, Newspapers and Contempt in English Law, 48 Harv. L. Rev. 885. A publication intended to

teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. Compare Judge Learned Hand in *Ex parte Craig*, 282 Fed. 138, 160-61. It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as annointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests.

It will not do to argue that a state cannot permit its judges to resist coercive interference with their work in hand because other officials of government must endure such obstructions. In such matters "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense. In a very immediate sense, legislators and executives express the popular will. But judges do not express the popular will in any ordinary meaning of the term. The limited power to punish for contempt which is here involved wholly rejects any assumption that judges are superior to other officials. They merely exercise a function historically and intrinsically different. From that difference is drawn the power which has behind it the authority and the wisdom of our whole history. Because the function of judges and that of other officials in special situations may approach similarity, hard cases can be put which logically may contradict the special quality of the judicial process. "But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.

Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States*, 233 U. S. 604, 610.

We are charged here with the duty, always delicate, of sitting in judgment on state power. We must be fastidiously careful not to make our private views the measure of constitutional authority. To be sure, we are here concerned with an appeal to the great liberties which the Constitution assures to all our people, even against state denial. When a substantial claim of an abridgment of these liberties is advanced, the presumption of validity that belongs to an exercise of state power must not be allowed to impair such a liberty or to check our close examination of the merits of the controversy. But the utmost protection to be accorded to freedom of speech and of the press cannot displace our duty to give due regard also to the state's power to deal with what may essentially be local situations.

Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society. While we are reviewing a judgment of the California Supreme Court and not an act of its legislature or the voice of the people of California formally expressed in its constitution, we are in fact passing judgment on "the power of the State as a whole." *Rippey* v. *Texas*, 193 U. S. 504, 509; *Skiriotes* v. *Florida*, 313 U. S. 69, 79; *United Gas Co.* v. *Texas*, 303 U. S. 123, 142; *Missouri* v. *Dockery*, 191 U. S. 165, 171; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 244.

By the constitution of California, as authoritatively construed by its Supreme Court and therefore as binding upon this Court as though ratified by all the voters of California, the citizens of that state have chosen to place in its courts the power, as we have defined it, to insure impartial justice. If the citizens of California have other desires, if they want to permit the free play of modern publicity in connection with pending litigation, it is within their easy power to say so and to have their way. They have ready means of amending their constitution and they have fre-

quently made use of them. We are, after all, sitting over three thousand miles away from a great state without intimate knowledge of its habits and its needs in a matter which does not cut across the affirmative powers of the national government. Some play of policy must be left to the states in the task of accommodating individual rights and the overriding public well-being which makes those rights possible. How are we to know whether an easy-going or stiffer view of what affects the actual administration of justice is appropriate to local circumstances? How are we to say that California has no right to model its judiciary upon the qualities and standards attained by the English administration of justice, and to use means deemed appropriate to that end by English courts.[6] It is surely an arbitrary judgment to say that the Due Process Clause denies California that right. For respect for "the liberty of the subject" though not explicitly written into a constitution, is so deeply embedded in the very texture of English feeling and conscience[7] that it survives, as the pages of Hansard abundantly prove, the exigencies of the life and death struggle of the British people. See, *e.g.*, Carr, Concerning English Administrative Law, c. 3 ("Crisis Legislation").

The rule of law applied in these cases by the California court forbade publications having "a reasonable tendency to interfere with the orderly administration of justice in pending actions". To deny that this age-old formulation of the prohibition against interference with dispassionate adjudication is

[6] "It is most important that the administration of justice in this country should not be hampered as it is hampered in some other countries, and it is not enlarging the jurisdiction of this court—it is refusing to narrow the jurisdiction of this court—when we say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment—and it is one which this court may yet have to award if the punishment we are about to award proves insufficient—will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by wealthy people, and it may even happen that they will take the chances of the fine and pay it cheerfully and will not feel that they have then paid too much for the advertisement." Rex *v.* Clarke, 103 L. T. R. (N. S.) 636, 640.

[7] Thus, in England, the "third degree" never gained a foothold, and its emergence was impressively resisted long before it was outlawed here. See 217 Parl. Deb. (Commons) cols. 1303 *et seq.* (May 17, 1928); Inquiry in regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929).

properly confined to the substantive evil is not only to turn one's back on history but also to indulge in an idle play on words unworthy of constitutional adjudication. It was urged before us that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck* v. *United States*, 249 U. S. 47. Our duty is not ended with the recitation of phrases that are the short-hand of a complicated historic process. The phrase "clear and present danger" is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension.

Here the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the "clear and present danger" test gives rise. "It is a question of proximity and degree." *Schenck* v. *United States, supra* at 52. And this, according to Mr. Justice Brandeis "is a rule of reason . . . . Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment." *Schaefer* v. *United States*, 251 U. S. 466, 482-83. Has California's judgment here undermined liberties protected by the Constitution? In common with other questions of degree, this is to be solved not by short-hand phrases but by consideration of the circumstances of the particular case. One cannot yell "Fire" in a crowded theater; police officers cannot turn their questioning into an instrument of mental oppression. *Chambers* v. *Florida*, 309 U. S. 227.

If a rule of state law is not confined to the evil which may be dealt with but places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. This is true whether the rule of law be declared in a statute or in a decision of a court. *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296. In the cases before us there was no

blanket or dragnet prohibition of utterance affecting courts. Freedom to criticize their work, to assail generally the institution of courts, to report and comment on matters in litigation but not to subvert the process of deciding—all this freedom was respected. Only the state's interest in calm and orderly decisions, which represented also the constitutional right of the parties, led it to condemn coercive utterances directed towards a pending proceeding. California, speaking through its courts, acted because of their conclusion that such utterances undermined the conditions necessary for fair adjudication.

It is suggested that threats, by discussion, to untrammeled decisions by courts are the most natural expressions when public feeling runs highest. But it does not follow that states are left powerless to prevent their courts from being subverted by outside pressure when the need for impartiality and fair proceeding is greatest. To say that the framers of the Constitution sanctified veiled violence through coercive speech directed against those charged with adjudication is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its forms while stultifying its uncontaminated exercise.

We turn to the specific cases before us:

The earliest editorial involved in No. 3, "Sit-strikers Convicted", commented upon a case the day after a jury had returned a verdict and the day before the trial judge was to pronounce sentence and hear motions for a new t ial and applications for probation. On its face the editorial merely expressed exulting approval of the verdict, a completed action of the court, and there is nothing in the record to give it additional significance. The same is true of the second editorial, "Fall of an Ex-Queen", which luridly draws a moral from a verdict of guilty in a sordid trial and which was published eight days prior to the day set for imposing sentence. In both instances imposition of sentences was immediately pending at the time of publication, but in neither case was there any declaration, direct or sly, in regard to this. As the special guardian of the Bill of Rights this Court is under the heaviest responsibility to safeguard the liberties guaranteed from any encroachment, however astutely disguised. The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding, so long as this is not done in a manner interfering with the impartial disposition of a litigation. There is

no indication that more was done in these editorials; they were not close threats to the judicial function which a state should be able to restrain. We agree that the judgment of the state court in this regard should not stand.

"Probation for Gorillas?", the third editorial, is a different matter. On April 22, 1938, a Los Angeles jury found two defendants guilty of assault with a deadly weapon and of a conspiracy to violate another section of the penal code. On May 2nd, the defendants applied for probation and the trial judge on the same day set June 7th as the day for disposing of this application and for sentencing the defendants. In the Los Angeles Times for May 5th appeared the following editorial entitled "Probation for Gorillas?":

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

This editorial was published three days after the trial judge had fixed the time for sentencing and for passing on an application for probation, and a month prior to the date set. It consisted of a sustained attack on the defendants, with an explicit demand of the judge that they be denied probation and be sent "to the jute mill". This meant, in California idiom, that in the

exercise of his discretion the judge should treat the offense as a felony, with all its dire consequences, and not as a misdemeanor. Under the California Penal Code the trial judge had wide discretion in sentencing the defendants: he could sentence them to the county jail for one year or less, or to the state penitentary for two years. The editorial demanded that he take the latter alternative and send the defendants to the "jute mill" of the state penitentiary. A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake". Clearly, the state court was justified in treating this as a threat to impartial adjudication. It is too naive to suggest that the editorial was written with a feeling of impotence and an intention to utter idle words. The publication of the editorial was hardly an exercise in futility. If it is true of juries it is not wholly untrue of judges that they too may be "impregnated by the environing atmosphere". Mr. Justice Holmes in *Frank* v. *Mangum*, 237 U. S. 309, 349. California should not be denied the right to free its courts from such coercive, extraneous influences; it can thus assure its citizens of their constitutional right of a fair trial. Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. Comment after the imposition of sentence—criticism, however unrestrained, of its severity or lenience or disparity, cf. *Ambard* v. *Attorney General for Trinidad and Tobago*, [1936] A. C. 322,—is an exercise of the right of free discussion. But to deny the states power to check a serious attempt at dictating from without the sentence to be imposed in a pending case, is to deny the right to impartial justice as it was cherished by the founders of the Republic and by the framers of the Fourteenth Amendment. It would erect into a constitutional right opportunities for abuse of utterance interfering with the dispassionate exercise of the judicial function. *See Rex* v. *"Daily Mail"*, [1921] 2 K. B. 733, 749; *Attorney General* v. *Tonks*, [1939] N. Z. L. R. 533,

In *No. 1*, Harry R. Bridges challenges a judgment by the Superior Court of California fining him $125 for contempt. He was president of the International Longshoremen's and Warehousemen's Union, an affiliate of the Committee for Industrial Organization, and also West Coast director for the C. I. O. The I. L. W. U. was largely composed of men who had withdrawn from the International Longshoremen's Association, an affiliate of the American Federation of Labor. In the fall of 1937 the rival longshoremen's unions were struggling for control of a local in San Pedro Harbor. The officers of this local, carrying most of its members with them, sought to transfer the allegiance of the local to I. L. W. U. Thereupon, longshoremen remaining in I. L. A. brought suit in the Superior Court of Los Angeles county against the local and its officers. On January 21, 1938, Judge Schmidt, sitting in the Superior Court, enjoined the officers from working on behalf of I. L. W. U. and appointed a receiver to conduct the affairs of the local as an affiliate of the A. F. of L., by taking charge of the outstanding bargaining agreements of the local and of its hiring hall, which is the physical mainstay of such a union. Judge Schmidt promptly stayed enforcement of his decree, and on January 24th the defendants in the injunction suit moved for a new trial and for vacation of the judgment. In view of its local setting, the case aroused great public interest. The waterfront situation on the Pacific Coast was also watched by the United States Department of Labor, and Bridges had been in communication with the Secretary of Labor concerning the difficulties. On the same day that the motion for new trial was filed, Bridges sent the Secretary the following wire concerning Judge Schmidt's decree:

"This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

This telegram duly found its way into the metropolitan newspapers of California. Bridges' responsibility for its publication is clear. His publication of the telegram in the Los Angeles and San Francisco papers is the basis of Bridges' conviction for contempt.

The publication of the telegram was regarded by the state supreme court as "a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up" and "a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision". This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that in the context of the immediate case—the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made—this could not have dominated the mind of the judge before whom the matter was pending. Here too the state court's judgment should not be overturned.

The fact that the communication to the Secretary of Labor may have been privileged does not constitutionally protect whatever extraneous use may have been made of the communication. It is said that the possibility of a strike, in case of an adverse ruling, must in any event have suggested itself to the private thoughts of a sophisticated judge. Therefore the publication of the Bridges telegram, we are told, merely gave that possibility public expression. To afford constitutional shelter for a definite attempt at coercing a court into a favorable decision because of the contingencies of frustration to which all judicial action is subject, is to hold, in effect, that the Constitution subordinates the judicial settlement of conflicts to the unfettered indulgence of violent speech. The mere fact that after an unfavorable decision men may, upon full consideration of their responsibilities as well as their rights, engage in a strike or a lockout, is a poor reason for denying a state the power to protect its courts from being bludgeoned by serious threats while a decision is hanging in the judicial balance. A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter. To deny such realities is to stultify law. Rights must be judged in their context and not *in vacuo*. Compare *Aikens* v. *Wisconsin*, 195 U. S. 194, 205; *Balders* v. *United*

States, 240 U. S. 391, 393-94; *Amer. Bank & Trust Co.* v. *Federal Bank*, 256 U. S. 350, 358. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." Mr. Justice Brandeis in *Duplex Co.* v. *Deering*, 254 U. S. 443, 488.

The question concerning the narrow power we recognize always is—was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation.[8] Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience, professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully immediately upon completion of judicial conduct. Because courts, like other agencies, may at times exercise power arbitrarily and have done so, resort to this Court is open to determine whether, under the guise of protecting impartiality in specific litigation, encroachments have been made upon the liberties of speech and press. But instances of past arbitrariness afford no justification for reversing the course of history and denying the states power to continue to use time-honored safeguards to assure unbullied adjudications. All experience justifies the states in acting upon the conviction that a wrong decision in a particular case may best be forestalled or corrected by more rational means than coercive intrusion from outside the judicial process.

Since courts, although representing the law, *United States* v. *Shipp*, 203 U. S. 563, 574, are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt, it should be used only in flagrant cases and with the utmost

[8] The present cases are very different from the situation that evoked dissent in Craig v. Hecht, 263 U. S. 255, 281: "It is not enough that somebody may hereafter move to have something done. There was nothing awaiting decision when the petitioner's letter was published." And see Glasgow Corporation v. Hedderwick & Sons (1918) Sess. Cas. 639. Compare State ex rel. Pulitzer Pub. Co. v. Coleman, 152 S. W. 2d 640 (Mo. 1941).

forbearance. It is always better to err on the side of tolerance and even of disdainful indifference.

No objections were made before us to the procedure by which the charges of contempt were tried. But it is proper to point out that neither case was tried by a judge who had participated in the trials to which the publications referred. Compare *Cooke* v. *United States*, 267 U. S. 517, 539. So it is clear that a disinterested tribunal was furnished, and since the Constitution does not require a state to furnish jury trials, *Maxwell* v. *Dow*, 176 U. S. 581; *Palko* v. *Connecticut*, 302 U. S. 319, 324, and states have discretion in fashioning criminal remedies, *Tigner* v. *Texas*, 310 U. S. 141, the situation here is the same as though a state had made it a crime to publish utterance having a "reasonable tendency to interfere with the orderly administration of justice in pending actions", and not dissimilar from what the United States has done in § 135 of the Criminal Code.[9]

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[9] 35 Stat. 1113, 18 U. S. C. § 241. "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."